DOCKET

PROCEEDINGS AND ORDERS DATE: 032985

CASE NBR 84-1-05943 CSY
SHORT TITLE Thomas, Donald
VERSUS Maryland

DOCKETED: Dec 20 1984

Date	Proceedings and Orders
Dec 20 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 29 1985	Order extending time to file response to petition until February 22, 1985.
Feb 22 1985	Brief of respondent Maryland in opposition filed.
Feb 28 1985	DISTRIBUTED. March 15, 1985
Mar 18 1985	REDISTRIBUTED. March 22, 1985
Mar 25 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.) Justice Powell OUT.

****

PETITION FOR WRIT OF CERTIORARI

Misc. No. 84-5943

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DONALD THOMAS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ORIGINAL

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Donald Thomas, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

43 pp

The Petitioner's affidavit in support of this Petition is attached hereto.

GEORGE E. BURNS, JR.
Assistant Public Defender
Tower Building, Fourth Floor
222 East Baltimore Street
Baltimore, Maryland 21202
(301)659-4842

Counsel for Petitioner

84-5943

Misc. No.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DONALD THOMAS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Donald Thomas, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

---

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

---

3. Do you own any cash or checking or savings account? No

(a) If the answer is yes, state the total value of the items owned.

---

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

(a) If the answer is yes, describe the property and state its approximate value.

---

5. List the persons who are dependent upon you for support and state your relationship to those persons.

No

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Donald Thomas
DONALD THOMAS

Subscribed and sworn to before me, a Notary Public, this 18th day of Dec, 1984.

NOTARY PUBLIC

My Commission Expires: July 86

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DONALD THOMAS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

George E. Burns, Jr.
Assistant Public Defender
Tower Building, Fourth Floor
222 E. Baltimore Street
Baltimore, Maryland 21202
(301) 659-4842

Counsel for Petitioner

Of Counsel:

Michael R. Braudes
Assistant Public Defender
Tower Building, Fourth Floor
222 E. Baltimore Street
Baltimore, Maryland 21202
(301) 659-4869

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DONALD THOMAS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

Petitioner Donald Thomas respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Court of Appeals of Maryland in Thomas v. State, ___ Md. ___, ___ A.2d ___ (No. 151, September Term, 1982, and No. 44, September Term, 1983, decided October 31, 1984).

QUESTIONS PRESENTED

1. Was Petitioner sentenced to death upon evidence obtained in violation of his right to counsel as construed in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)?

2. Does the Maryland death penalty statute, Md. Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 413, unconstitutionally allocate the burden of proof to the defendant to establish the existence of mitigating factors and to establish that statutory mitigating factors outweigh statutory aggravating factors; unconstitutionally bar consideration of evidence in mitigation; and prevent the sentencer from making an independent determination as to whether death is the proper penalty?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION

STATUTES

RULE

MISCELLANEOUS

OPINIONS BELOW

The Court of Appeals of Maryland filed a reported (official) opinion on October 31, 1984, which is attached as an appendix to this Petition.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the decision of the Court of Appeals of Maryland rendered October 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV:

> ...[N]or shall any state deprive any person or life, liberty, or property, without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Secs. 412-414, provides:

Section 412. Punishment for murder.

(a) Designation of degree by court or jury. -- If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) Penalty for first degree murder. -- A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with Sec. 413.

(c) Penalty for second degree murder. -- A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

Section 413. Sentencing procedure upon finding of guilty of first degree murder.

(a) Separate sentencing proceeding required. -- If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon

as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisonment for life.

(b) Before whom proceeding conducted. -- This proceeding shall be conducted:

(1) Before the jury that determined the defendant guilty; or

(2) Before a jury empaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined by defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) Evidence; argument; instructions -- (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g);

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to Section 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or (h).

(d) Consideration of aggravating circumstances -- In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of Section 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration of the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit robbery, arson, rape, or sexual offense in the first degree.

(e) Definitions. -- As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) The term "law enforcement officer" has the meaning given in Section 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) Finding that no aggravating circumstances exist. -- If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life

(g) Consideration of mitigating circumstances. -- If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) Weighing mitigating and aggravating circumstances. -- (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) Determination to be written and unanimous. -- The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) Statements required in determination. -- The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances found under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) Imposition of sentence. -- (1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(l) Rules of procedure. -- The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

Section 414. Automatic review of death sentences.

(a) Review by Court of Appeals required. -- Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) Transmission of papers to Court of Appeals. -- The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case.

(c) Briefs and oral argument. -- Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) Consolidation of appeals. -- Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) Consideration by Court of Appeals. -- In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's findings of a statutory aggravating circumstance under Section 413(d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) Decision of Court of Appeals. -- (1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under Section 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) Rules of procedure. -- The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section.

RULE INVOLVED

Rule 772A. Sentencing -- Procedure in Capital Cases.

a. Scope.

This rule applies to all cases for which sentences are imposed under Code, Article 27, Section 413.

b. Statutory Sentencing Procedure.

If a defendant has been found guilty of murder in the first degree, and if the State has given the notice required under Code, Article 27, Section 412(b), a separate sentencing proceeding shall be

conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, Section 413.

c. Judge.

Except as provided in Rule 750, the judge who presides at trial shall preside at the sentencing proceeding.

d. Written Findings and Determination.

The findings and determination shall be made in writing in the following form:

(Caption)
FINDINGS AND SENTENCING DETERMINATION
SECTION I

Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked "yes" has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked "no" has not been proven BEYOND A REASONABLE DOUBT:

1. The victim was a law enforcement officer who was murdered while in the performance of his duties. Yes No

2. The defendant committed the murder at a time when he was confined in a correctional institution. Yes No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer. Yes No

4. The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct. Yes No

5. The victim was a child abducted in violation of Code, Article 27, Section 2. Yes No

6. The defendant committed the murder pursuant to an agreement to contract for remuneration of the promise or remuneration to commit the murder.

Yes No

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration of the promise of remuneration.

Yes No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

Yes No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

Yes No

10. The defendant committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree.

Yes No

SECTION II

Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "Yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked "No" has not been proven by A PREPONDERANCE OF THE EVIDENCE:

1. The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay or entry of judgment pursuant to a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun

in the commission of a felony or another crime of violence.

Yes No

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

Yes No

3. The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense of the prosecution.

Yes No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

Yes No

5. The youthful age of the defendant at the time of the crime.

Yes No

6. The act of the defendant was not the sole proximate cause of the victim's death.

Yes No

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

Yes No

8. Other mitigating circumstances exist, as set forth below:

Yes No

_____

_____

_____

(Use reverse side if necessary)

(If one or more of the above in Section II have been marked "Yes", complete Section III. If all of the above in Section II are marked "No", you do not complete Section III.)

SECTION III

Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

Yes No

DETERMINATION OF SENTENCE

ENTER THE DETERMINATION OF SENTENCE EITHER "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no" enter "Life Imprisonment."
2. If Section III was completed and was marked "yes" enter "Life Imprisonment."
3. If Section II was completed and all of the answers were marked "no" then enter "Death."
4. If Section III was completed and was marked "no" enter "Death."

We unanimously determine the sentence to be _____

Foreman	Juror 7
Juror 2	Juror 8
Juror 3	Juror 9
Juror 4	Juror 10
Juror 5	Juror 11
Juror 6	Juror 12

or, _____ JUDGE

e. Advice of the Judge.

Immediately after imposing sentence, the judge shall advise the defendant of the right to file an appeal and the time within which the defendant must

exercise this right. The judge shall also advise a defendant who receives a sentence of death that (1) only his sentence will be automatically reviewed by the Court of Appeals, and (2) the sentence will be stayed pending a review of the sentence by the Court of Appeals and any appeal he may take.

f. Report of Judge.

When the judgment becomes final, the judge promptly shall prepare and send to the parties a report in the following form.

(Caption)
REPORT OF TRIAL JUDGE

I. Data Concerning Defendant
   - A. Date of Birth
   - B. Sex
   - C. Race
   - D. Address
   - E. Length of Time in Community
   - F. Reputation in Community
   - G. Family Situation and Background
     1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
     2. Family history (describe family history including pertinent data about parents and siblings)
   - H. Education
   - I. Work Record
   - J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
   - K. Military History
   - L. Pertinent Physical or Mental Characteristics or History
   - M. Other Significant Data About Defendant

II. Data Concerning Offense
   - A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
   - B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so, describe.
   - C. Did the defendant know the victim prior to the offense? Yes ___ No ___
     1. If so, describe relationship
     2. Did the prior relationship in any way

precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim
   1. Name
   2. Date of Birth
   3. Sex
   4. Race
   5. Length of time in community
   6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not Guilty ___; Guilty ___; Not Guilty by Reason of Insanity ___

B. Election of Mode of Trial:
Court ___ Jury ___
If a jury trial was elected, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel
   1. Name
   2. Address
   3. Appointed or retained
   (If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished)

D. Pre-Trial Publicity -- Did defendant request a mistrial or a change of venue on the basis of publicity? If so explain. Attach copies of any motion made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which state relied in the pretrial notice.

B. Election of court or jury -- Was the proceeding conducted before same judge as trial _____
before same jury _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so explain.

C. Counsel -- If counsel at sentencing was different from trial counsel, give information requested III. C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life imprisonment
Death

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence) -- began and ended
Sentence imposed

VI. Recommendation of Trial Court As to Whether Imposition of Sentence of Death is Justified

VII. A copy of the Findings and Sentencing Determination made in this case is attached to and made a part of this report.

_____
JUDGE

CERTIFICATION

I certify that on the _____ day of _____, 19__, I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

_____
JUDGE

Within five days after receipt of the report, the parties may submit to the judge written comments concerning factual accuracy of the report. The judge promptly shall file his final report and any comments of the parties with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals.

STATEMENT OF THE CASE

Procedural History

Petitioner was charged with two counts of first-degree murder, one count of first-degree rape, two counts of first-degree sexual offense, and one count of armed robbery. The State of Maryland apprised Petitioner that in the event of a conviction of first-degree murder, it would seek the death penalty. On August 19 through November 18, 1982, Petitioner was tried by the Circuit Court for Baltimore County, Maryland, and was convicted by a jury of the above-enumerated offenses. On December 8-10, 1982, a capital sentencing hearing was conducted by the honorable Cullen H. Normes, the presiding trial judge, pursuant to Petitioner's waiver of jury sentencing. On December 13, 1982, the court imposed a sentence of death upon one of the counts of first-degree murder, and various terms of incarceration upon the remaining convictions.

On October 31, 1984, the Court of Appeals of Maryland affirmed the conviction and sentence. Four judges voted for affirmance, two judges dissented on the basis of the first issue presented by this Petition, and one judge did not participate because of illness.

Relevant Facts

During the early-morning hours of October 2, 1981, Donald and Sarah Spurling were stabbed to death in their home at 5643 Chelwynd Road in Baltimore County, Maryland. A

boarder, Noel Wilkins, was raped. Petitioner was convicted of being the perpetrator of those offenses. The details surrounding the offenses, and Petitioner's defense thereto, are not germane to this Petition.

Prior to trial, Petitioner filed a plea of not guilty by reason of insanity. As a result, the Circuit Court issued an order directing that Petitioner be examined by the State Department of Health and Mental Hygiene. Pursuant to that order, Petitioner was transferred to the Clifton T. Perkins Hospital Center ("Perkins"), where he was examined and evaluated by the staff. It is essential to note that Perkins is a neutral, objective party in the context of criminal litigation, obligated to represent neither the prosecution nor the defense. See Johnson v. State, 292 Md. 405, 414, 439 A.2d 542 (1982), where the Court of Appeals of Maryland so held.

On February 4, 1982, Perkins issued its report, which contained the evaluations of four staff doctors. One of those doctors was a forensic psychiatrist, Dr. Michael Spodak. The Perkins report concluded that Petitioner was competent to stand trial and had been legally sane at the time of the offense.

After the trial on the issue of guilt or innocence, the State retained Dr. Spodak as its own, paid, expert for purposes of Petitioner's sentencing proceeding. Without informing the defense that Dr. Spodak had changed roles, the

prosecutor obtained defense counsel's consent to a follow-up examination of Petitioner by Dr. Spodak. The prosecutor then filed the following petition:

PETITION FOR
PRE-SENTENCE PSYCHIATRIC EVALUATION

Now comes the State of Maryland, by Sandra A. O'Connor, State's Attorney for Baltimore County and by Thomas S. Basham and Alfred L. Brennan, Jr., Assistant State's Attorneys for Baltimore County, and says:

1. That the Defendant was evaluated at the Clifton T. Perkins Hospital Center following his entry of a plea of not guilty by reason of insanity;

2. That the findings of the " spital Center are contained in a report to the Court dated February 4, 1982;

3. That it is desirable to supplement the original insanity evaluation with further interview(s) of the Defendant to develop material for presentation at sentencing;

4. That Dr. Michael Spodak, who participated in the insanity evaluation, can conduct such further interview with the Defendant at the Baltimore County Detention Center and can do so within a few days of a court order authorizing such evaluation;

5. That counsel for the Defendant has no objection to such an evaluation.

WHEREFORE, the State prays that this Honorable Court pass an order directing Dr. Michael Spodak to conduct a further evaluation of the Defendant at the Baltimore County Detention Center for the purpose of developing material for use at sentencing.

/s/
SANDRA A. O'CONNOR
State's Attorney for
Baltimore County

The petition was granted, and Dr. Spodak again examined Petitioner, without defense counsel present,[1] this time for the purpose of testifying on behalf of the prosecution at the sentencing hearing. At that hearing, Dr. Spodak acknowledged that "I was retained by the State's Attorney's Office". When the prosecution sought to introduce the doctor's examination report into evidence, defense counsel objected both to the report and to his testimony. He argued as follows:

> MR. KINSLEY [defense attorney]: I would object, Your Honor, not only to that but to the Doctor's testimony. When the State's Attorney requested an order of Court to have Dr. Spodak see the Defendant again on November 27th, the State's Attorney in his requested Order of the Court indicated that counsel for the Defendant had no objection. Indeed, I had no objection because I was under the impression that Dr. Spodak would see him as a member of the staff of Clifton T. Perkins.
>
> I'm mindful of the Court of Appeals ruling that the Clifton T. Perkins staff, a governmental body, employees of the State of Maryland as is Dr. Spodak when he's at Clifton T. Perkins, that they are neutral or should be neutral psychiatrists and other medical personnel. That the Defense in effect has no obligation to employ separate psychiatrists but can accept this puritan view of the psychiatrists employed by the State as is Dr. Spodak, but I have learned subsequent to my agreement that I had no objection to Dr. Spodak seeing the Defendant that he was now in the employee -- he was a paid doctor by the State's Attorney's Office.

---

[1] It appears from the record that Dr. Spodak told Petitioner that he did not have to speak with him, but said nothing about the presence of or right to counsel.

> This came to me as a shocking revelation, and had I known it before, I would not have permitted it. I would have been to the Baltimore County Jail and would have advised my client not to discuss any matters with Dr. Spodak so long as he was then in the employ of the State's Attorney's Office, so I suggest that the alleged agreement by me of this whole proceeding was done without a full candid revelation. That I have been taken so to speak. That the Doctor is no longer a pure objectionist, but is a paid person whose views obviously more than likely reflect the views sought by his employer, Mr. Basham, so I move that his report not be considered and that his testimony be suppressed.

The prosecutor declined to respond; nevertheless, the objection was overruled. Dr. Spodak went on to testify at length. His testimony was devastating to the defense, rebutting in detail the defense position that Petitioner was entitled to mitigating factors based upon impairment of his ability to appreciate the criminality of his conduct and his position that if spared the death penalty, he would not constitute a continuing threat to society. Dr. Spodak testified, in large part based upon the second interview, that Petitioner is a threatening, hostile, violent, and dangerous person.

The trial judge rejected the claimed mitigating factors, relying specifically upon Dr. Spodak's testimony, and sentenced Petitioner to death.

REASONS FOR ALLOWANCE OF THE WRIT

I. Petitioner was sentenced to death on the basis of evidence obtained in violation of his right to counsel.

As set forth above, the defense was misled into believing that Petitioner was to be examined by an objective, neutral psychiatrist, for the purpose of developing evidence to be used at the sentencing hearing. As a result, counsel permitted the examination. In fact, it was a paid partisan of the State who conducted the examination, and then gave testimony which was heavily relied upon by the sentencing judge in imposing the ultimate sanction. It is asserted that permitting Dr. Spodak to testify under these circumstances was a clear violation of the right to counsel as construed by this Court in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

In Estelle, as here, the issue was "whether the prosecution's use of psychiatric testimony at the sentencing phase of [the defendant's] capital murder trial to establish his future dangerousness violated his constitutional rights." 451 U.S. at 456. The defendant was ordered to undergo a pretrial competency examination. His counsel was not informed of the scope of that examination, did not consent to it, and did not advise his client with regard to it. At the sentencing phase of the case, as here, the testimony of the examining psychiatrist was an important factor leading to a sentence of death.

This Court held that the admission of the testimony was error on both Fifth and Sixth Amendment grounds. With regard to the Sixth Amendment right, the Court held that the defendant "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." 451 U.S. at 471. The Court went on to hold "that a defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.'"

Petitioner submits that there is no principled distinction between Estelle v. Smith and the instant case. If anything, the denial of the right to counsel is more egregious here. When the request for the follow-up examination was made, defense counsel's consent secured, the defense could only believe that Dr. Spodak remained a neutral, unbiased witness. His substantial change of roles was not disclosed, and counsel made clear that had such disclosure been made the examination would not have been permitted. As a result, Petitioner faced the doctor alone. The results of that examination were devastating - the doctor's report and testimony were causally connected to the sentence of death.

The patent violation of Petitioner's right to counsel, with its resulting death sentence, requires review and reversal by this Court.

II. The Maryland death penalty statute is unconstitutional.

Death penalty litigation in Maryland is steadily increasing. At present, 19 persons have been sentenced to death; their cases are in various stages of the appellate process. Twenty-one cases are now pending in which the prosecution has filed a notice of intention to seek the death penalty. The Maryland State Public Defender's Office has been informed that in several additional such notices are almost certainly imminent in pending murder cases. Until 1982, it was rare that the death penalty would be sought in Maryland, and rarer still that a death sentence would survive review by the Court of Appeals. In the past two years, that situation has altered radically,[2] and a substantial number of executions within the next few years is now a distinct possibility.

The constitutional validity of the statute under which all of these inmates have been sentenced has been called into serious question. In Stebbing v. Maryland, ___ U.S. ___ (No. 84-5079, decided October 9, 1984), Justice Marshall, joined by Justice Brennan, dissented from this Court's denial of Stebbing's petition for writ of certiorari. In an opinion expounding upon his reasons for dissenting, Justice Marshall pointed out serious flaws in the Maryland statutory scheme. Specifically, the statute places two different burdens of proof upon the defendant at the

---

[2] See White v. State, 300 Md. 719, 481 A.2d 201 (1984); Trimble v. State, 300 Md. 387, 478 A.2d 1143 (1984); Stebbing v. State, 299 Md. 331, 473 A.2d 903 (1984); Colvin v. State, 299 Md. 88, 472 A.2d 953 (1984); Tichnell v. State, 297 Md. 432, 468 A.2d (1983).

sentencing stage; it "prevents the sentencer from making an independent determination as to whether death is a proper penalty"; and it "bars consideration of certain mitigating evidence when the sentencer decides whether to impose a life or death sentence". ___ U.S. at ___; Slip op. at 1.

Petitioner submits that in light of the proliferation in death penalty cases in Maryland, it is now vitally important that the constitutionality of the Maryland scheme be definitively resolved by this Court. The litigation of any death penalty case requires a major expenditure of time and resources. If it is held at some future time that the Maryland statute is invalid, an increasingly large group of cases will require reversal and retrial. Of greater seriousness, the possibility exists that persons will be executed as a result of the application of a statute subsequently ruled invalid.

Of primary concern to Petitioner is the improper allocation of the burden of proof. Under the Maryland scheme, the capital defendant must both establish the existence of mitigating factors, and the fact that they outweigh the aggravating factors. A number of authorities have considered whether the Eighth and Fourteenth Amendments require allocation of the burden of proof on the prosecution on the question of whether death is appropriate, and if so what the standard must be.[3] Ford v. Strickland,

---

[3]Statutes so placing the burden, and thus not directly affected by the issue posed in this case, include Ark. Stat. Ann. Sec. 41-1302(1)(beyond a reasonable doubt); Cal. Penal

696 F.2d. 804, 817-819 (11th Cir.) cert. denied ___ U.S. ___, 78 L.Ed.2d 176 (1983); Tichnell v. State, 287 Md. 695, 729-30, 415 A.2d. 830 (1980) cert. denied ___ U.S. ___, 80 L.Ed.2d 846 (1983); State v. Wood, 648 P.2d 71, 83 (Utah, 1982); Comment, "Capital Punishment and the Burden of Proof: The Sentencing Decision," 17 Cal. W.L. Rev. 316 (1981); Comment, "Tichnell v. State Maryland's Death Penalty: The Need for Reform", 42 Md.L.Rev. 875 (1983). See also Smith v. North Carolina, supra, and Lockett v. Ohio, 438 U.S. 586, 609, n.16 (1978) (issue raised but not decided). This Court has not passed on the question.

The Maryland Statute, Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 413, as implemented by Maryland Rule 772A, not only places the burden on the capital defendant "to convince [the sentencer] that mitigating circumstances outweigh[ ] the aggravating circumstances," Tichnell v. State, 290 Md. 43, 61, 427 A.2d. 991 (1981) cert. denied ___ U.S. ___, 80 L.Ed.2d 846 (1983), but further requires the sentence of death once the bare existence of a statutory aggravating factor is established if the defendant fails to meet his burden of proof and persuasion. The decision below hold in effect that Maryland may constitutionally require the sentence of death in circumstances where the sentencer is unconvinced that death is the appropriate punishment.

Code Sec. 190.1; N.C. Gen. Stat. Sec. 15-A-2000; Ohio Rev. Code Ann. Sec. 2929.03 (d)(1); Pa. Cons. Stat. Sec. 9711(c); Tex. Code Crim. Pro. Art. 37.071 (beyond a reasonable doubt); Wash. Rev. Code Chapter 10.95.060.

These decisions are inconsistent with this Court's repeated insistence that that State procedures assure "reliability in the determination that death is the appropriate punishment in specific case." Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235, 255 (1983); Gardner v. Florida, 430 U.S. 349, 363 (1977) (White, J., concurring); Lockett v. Ohio, 428 U.S. 586, (1978), Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The Maryland Statute requires the Court or jury, as the sentencing body, to consider first "whether, beyond a reasonable doubt, any of the [ten enumerated][4] aggravating circumstances exist." Sec. 413(d). Once the existence of

---

[4](1) The victim was a law enforcement officer who was murdered while in the performance of his duties.
(2) The defendant committed the murder at a time when he was confined in any correctional institution.
(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
(4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
(5) The victim was a child abducted in violation of Section 2 of this article.
(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.
(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.
(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.
(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.
(10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree.

at least one aggravating circumstance is found, the sentencing body "shall then consider whether, by a preponderance of the evidence, any of the following mitigating circumstances exist: ..." Sec. 413(g).[5] If no mitigating circumstance is proven to exist by a preponderance of the evidence, the sentencer enters the word "Death" on the sentencing form. Sec. 413(h)(2); Maryland Rule 772A(d). If mitigating circumstances are found to exist, the court or jury must then "determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating

---

[5](1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a hangun in the commission of a felony or another crime of violence.
(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.
(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.
(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.
(5) The youthful age of the defendant at the time of the crime.
(6) The act of the defendant was not the sole proximate cause of the victim's death.
(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.
(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

circumstances." Sec. 413(h)(1). If the answer is negative, "the sentence shall be death." Sec. 413(h)(2); Maryland Rule 772A(d).

Maryland law, therefore, differs dramatically from the statutes of the majority of the States which permit the jury or judge to return a life sentence even where no "mitigating circumstances" are found[6] or which place upon the prosecution the ultimate burden of persuasion on the question of life or death, in some instances beyond a reasonable doubt.[7] Indeed, the Maryland Statute requires no independent assessment of whether death is appropriate under all the circumstances[8], an issue not necessarily resolved by

---

[6]Ala. Code Secs. 13-11-1 to 9; Del. Code tit. 11, Sec. 4209; Fla. Stat. Annot. Sec. 921.141; Ga. Code Annot. Sec. 27-2302; Ind. Code Ann. Sec. 35-50-2-9; Ky. Rev. Stat. Sec. 532.025 to .075; La. Code Crim. Pro. Ann. Arts. 905-905.9; Mo. Ann. Stat. Secs. 565.006 to .016; Neb. Rev. Stat. Secs. 29-2519 to 2525; Nev. Rev. Stat Sec. 175.552 to 562; N.H. Rev. Stat. Sec. 630.5; N.M. Stat. Sec. 31-18-14, 31-20A-1 to 6; N.C. Gen. Stat. Secs. 15 A-2000 to 2003; Okla. Stat. tit. 21, Secs. 701.10 to .15; S.C. Code Secs. 16-3-20 to 28; S.D. Cod. Laws Secs. 23A-27A-1 to 47; Va. Code Ann. Secs. 19.2-264.2 to .5; Wyo. Stat. Secs. 6-4-102 to 103.

[7]See Footnote 6, supra.

[8]Ark. Crim. Code, Secs. 41-1301; Miss. Code Ann. Secs. 99-19 (construed in Coleman v. State, 378 So. 2d 640 (Miss. 1979); N.C. Gen. Stat. Sec. 15A-2000(b)(1); Utah Code Secs. 763-206 to 207 (construed in State v. Wood, 648 P.2d 71, 83) (Utah, 1982).

the mechanical parsing of aggravating and mitigating factors. "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d. 1134, 1144 (1983). A jury may be unpersuaded that the crime itself warrants death; it may be unable to articulate those "compassionate ... factors stemming from the diverse frailties of humankind," Woodson, 428 U.S. at 304; because of the applicable standard of proof and its placement, the jury may be uncertain or even guessing as to whether death is the appropriate punishment in the specific case. In Maryland, that jury is nonetheless obliged to impose death unless the rigid formula be satisfied.

Justice Stevens stated the matter succinctly in his opinion respecting the denial of certiorari in Smith v. North Carolina, ___ U.S. ___, 74 L.Ed. 2d. 622 (1982), in which a literal reading of a sentencing instruction was perceived as mandating "two entirely separate inquiries:"

> First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "death is the appropriate punishment in a specific case." Lockett, supra, 438 U.S., at 601, (plurality opinion),

quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

A quotation from a recent opinion by the Utah Supreme Court, which takes a less rigid approach to this issue, will illustrate my point. In State v. Wood, 648 P.2d. 71, 83 (Utah 1982), that court wrote:

"It is our conclusion that the appropriate standard to be followed by the sentencing authority--judge or jury--in a capital case is the following:

> 'After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.'

These standards require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors. Not in terms of the relative numbers of the aggravating and the mitigating factors, but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the aggravating factors. The sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances." (Emphasis added) [Id. at 622][9]

---

[9]The apparent reasons for denying certiorari in Smith are not present here. Unlike the instruction at issue in Smith, which could be interpreted unobjectionably, there is nothing ambiguous about the Maryland law. It requires the very analysis found questionable by Justice Stevens, and on its face it forecloses the "slight changes in the form of ... instructions" which were suggested in Smith. Id. at 623. Postconviction proceedings will in no way develop the issues

In perhaps no other area of the law has the need for reliability in the decisional process been stressed as it has been in the capital punishment context. In other areas where this Court has perceived a need to minimize the risk of error in the adjudicatory process, it has not hesitated to place a heightened standard of proof upon the party seeking to change the status quo See, e.g. Santosky v. Kramer, 455 U.S. 745 (1982); Addington v. Texas, 441 U.S. (1979); In Re: Winship, 397 U.S. 358 (1970). The Maryland scheme, however, permits the capital sentencing decision to be made on the basis of the "preponderance of evidence standard", which "by its very terms demand[s] consideration of the quantity, rather than the quality of evidence," Santosky, 455 U.S. at 764, and "is quite consistent with want of belief," Trickett, "Preponderance of Evidence and Reasonable Doubt," 10 Dick.L.Rev. 76 (1906). Moreover, it places the ultimate burden of both production and persuasion on the capital defendant, who must be executed if he fails in that regard.[10]

---

here posed.

[10]Thus if, not improbably, the sentencer finds the evidence to be equally balanced ---- i.e. simply does not know whether mitigating circumstances outweigh aggravating circumstances ---- it must impose death. The fact that the defendant must succeed in meeting two separate burdens (showing the existence of the factors and then that they outweigh aggravation, both by a preponderance) clearly exacerbates the problem. If one defines preponderance of the evidence as, for example, representing 51 percent likelihood of correctness, then the likelihood that two successive decisions made on the basis of preponderance of the evidence

CONCLUSION

Resolution of the questions presented in this case will settle important questions left unanswered by this Court's prior decisions, in addition to applying clear precedent (Estelle v. Smith) to a novel factual situation. The relevant decisions of the Court of Appeals of Maryland offer the fullest appellate treatment of the issues posed, and review of those decisions will give direction to the courts of those States having provisions similar to Maryland's. A decision by this Court in these cases will explain, as no prior decision has explained, the meaning of this Court's oft-stated commitment to the "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson, 428 U.S. at 305.

Respectfully submitted,

GEORGE E. BURNS, JR.
Assistant Public Defender
Appellate Division
Tower Building, Fourth Floor
222 E. Baltimore Street
Baltimore, Maryland 21202
(301) 659-4842

Counsel for Petitioner

---

would be correct is equal to .51 multiplied by .51 or 26.01%: i.e., it is more likely than not that under these conditions the overall decision is incorrect. See M. Moroney, Facts from Figures 8-11 (Repr. 1976).

Of Counsel:

MICHAEL R. BRAUDES
Assistant Public Defender
Appellate Division
Tower Building, Fourth Floor
222 E. Baltimore Street
Baltimore, Maryland 21202
(301) 659-4869

lv
12/19/84

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

84-5943

ORIGINAL

APPENDIX

Opinions (majority and dissenting) of the Court of Appeals of Maryland

Burns | Brandeis

IN THE COURT OF APPEALS OF MARYLAND

No. 151, September Term, 1982

No. 44, September Term, 1983

DONALD THOMAS

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Cole
*Davidson
Rodowsky
Couch
Menchine, W. Albert
(retired, specially assigned
JJ.

Opinion by Murphy, C.J.
Eldridge and Cole, JJ., concur in part and dissent in part.

Filed: October 31, 1984

*Davidson, J., participated in the hearing and in the conference of the case in regard to its decision, but because of illness did not take part in the adoption of the opinion.

The appellant, Donald Thomas, was found guilty by a jury in the Circuit Court for Baltimore County of the first degree murders of Donald Spurling and his wife, Sarah. He was also found guilty at the same trial of raping Noel Wilkins, of committing two first degree sexual offenses upon Ms. Wilkins (cunnilingus and fellatio), and of robbing her at knife point of $20. The State having earlier given the requisite statutory notice that it would seek the death penalty for the two first degree murders, the ensuing sentencing hearing resulted in the imposition of the death penalty for Sarah's murder, a life sentence for Donald's murder, concurrent terms of life imprisonment for the rape and first degree sexual offenses, and a twenty-year consecutive sentence for the armed robbery. Thomas appealed, challenging both the guilty verdicts and the death sentence imposed upon him.

For the purposes of appeal, the parties have agreed to the following statement of facts:

> "At 4:41 a.m. on October 2, 1981, Officer Joseph Bayer of the Baltimore County Police Department received a call to respond to a reported double rape at 9643 Chelwynd Road, a residence located in Baltimore County. Five minutes later, Officer Bayer arrived at that address. Already on the scene, outside the residence, were two other police officers; a fourth officer arrived almost immediately thereafter. Officer Bayer entered the house

through the front door, followed by the other officers.

"Upon entering the house, Officer Bayer observed the body of Sarah Ann Spurling lying on the floor in a doorway between the kitchen and dining room. Ms. Spurling was nude from the waist down with the exception of a pair of panties, the crotch of which had been cut or torn away. Ms. Spurling was found lying in a pool of blood, and the cause of death was subsequently ascertained to be multiple stab wounds.

"Searching the house, the officers encountered two other persons. In the basement, the officers located the body of Donald Lee Spurling. The cause of Mr. Spurling's death was also multiple stab wounds. In an upstairs bedroom, the officers found an 18-month-old child later identified as the Spurlings' daughter Jennie, who was unharmed.

"The State's principal witness was Noel Ann Wilkins. Ms. Wilkins was a student who rented a room from the Spurlings at the time of the homicide. Ms. Wilkins testified that she went to bed at approximately 11:00 p.m. on October 1, 1981. Later that night, she was awakened by Ms. Spurling crying out in alarm; the cry was then cut off. Not fully awake, Ms. Wilkins remained in bed, where she continued to hear 'strange noises' from the downstairs portion of the house.

"According to Ms. Wilkins' testimony, at some point that evening she saw the silhouette of a man pass by her door, and

then heard the door to Jennie's bedroom open and close. Her own door was then opened, and a man whom she identified as Appellant entered her room. Threatening her with what appeared to be a butcher knife, the man tied her hands and forced her to engage in various sexual activities. Specifically, he placed his mouth on her genital area, engaged in vaginal intercourse, and forced her to kiss his penis. He then bound her with a lampcord and asked for money. She told him that there was $20.00 in a candy dish, and he took the $20.00.

"Ms. Wilkins went on to testify that she told Appellant that Donald Spurling would be coming home; Appellant responded 'I have taken care of him.' He asked her about guns, and she told him about a rifle case in the basement. He left to look for the guns. By this point, the bonds on her hands had come loose, and she exited through her bedroom window, climbed down a drainpipe, and ran for help.

"Kelly Gramm, who at that time was living at 5638 Chelwynd Road, testified that at approximately 4:30 or 5:00 a.m. on October 2, she heard Ms. Wilkins calling for help. She invited Ms. Wilkins in, and the latter called the police, stating that she had been raped, that there was still a child in the house, and that 'I think he has killed Sarah.'

"The defense did not dispute that Appelland had stabbed the Spurlings. The defense theory was that he killed Donald Spurling in self-defense when the latter attacked him; killed Sarah Spurling in a frenzied attempt to escape; and that the sexual encounter with Ms. Wilkins was consensual.

"Appellant testified on his own behalf. He related that during the evening of October 1, he was in downtown Baltimore playing video games. From a distance of half a block, he observed a minor traffic accident in which Donald Spurling was involved. Spurling asked him to remain until the police arrived as a witness on his behalf, and he complied. Thereafter, Spurling stated that he wished to pay Appellant for staying but had no money with him. Spurling asked him to accompany him home to obtain some money, and Appellant agreed. On the way, they stopped at the residence of one Sam Houseman, where Spurling demanded the repayment of a $20.00 debt. Houseman was unable to repay Spurling, and the latter threw him to the ground and beat him.[1]

"After stopping at a bar in Arbutus, Appellant and Spurling proceeded to Spurling's home. Sarah Spurling castigated her husband for failing to pick her up at work and ultimately went upstairs, leaving Appellant and Spurling alone in the kitchen. While there, Spurling stated that he had a 'job' for Appellant to do. It ultimately developed that Spurling was looking for a 'hit-man' to kill someone who had apparently cost him a great deal of money. Appellant responded that he would be willing to fight someone, but not to kill.

"The two proceeded to the basement, where Spurling showed Appellant his collection of guns and knives, indicating

---

"1. Appellant testified that he did not strike Houseman at all. Houseman testified that during the altercation, Appellant did in fact punch him.

that he would provide a weapon for the 'hit.' They proceeded to watch television and throw darts in the basement, after which they prepared and ate a meal in the kitchen and then returned to the basement.

"At this point, Appellant was under the impression that Spurling was acting and speaking strangely, as if he had been using Quaaludes. The conversation returned to the topic of Appellant killing someone who had 'cost [Spurling] a lot of money.' Appellant decided he did not like Spurling's attitude toward him, and stated that he wished to leave. Spurling said he would go upstairs and get some money from his wife to give Appellant so that he could return home.

"When Spurling returned, he informed Appellant that he could not give him any money, because his wife was still angry and refused to give him any. In lieu of giving him money, Spurling told him that there was a 'chick' upstairs (Noel Wilkins) who 'indulged in having sex with black guys.' He had checked with her, and she was willing to have sex with Appellant. Appellant went up to Noel's room, and they proceeded to engage in sexual relations.

"Appellant then returned to the basement. Spurling removed a knife from a gun cabinet, and again raised the subject of the 'hit job.' Appellant responded that he could not kill anyone and wanted to go home. At that point, Spurling 'toyed with the knife and for no apparent reason he stuck me in my leg.' After Spurling stabbed Appellant, Spurling held the knife pointing inward toward his own chest. Appellant 'pushed it to his chest,' and the knife fell onto a sofa. Appellant grabbed it and ran toward the steps leading upstairs

from the basement. Spurling grabbed him, and Appellant, in fear because Spurling had already stabbed him and was much larger than himself, continually slashed him with the knife.

"Appellant then ran back to Noel's room, stating that he was in trouble and asking for money. He then ran downstairs, saw Sarah's body, and realized that he had killed her. (He testified subsequently that he had 'blanked out' after the fight with Spurling and did not remember encountering Mrs. Spurling at all.) He returned to Ms. Wilkins' room for a third time; she voluntarily gave him $20.00 and a pair of jeans to replace his bloody pants. He then tied her up and fled.

"In rebuttal, the State requested that the court call as a court's witness Michael Thomas, Appellant's brother. The State proffered that on October 11, 1981, Assistant State's Attorney Thomas Basham had telephoned the witness to ask him questions about the case, but that he had refused to cooperate. On October 26, the witness recanted a statement given to investigating officers on October 4, during which he related what Appellant had told him after the crime occurred. On this basis, the prosecutors stated that they were unable to vouch for the witness's credibility. Over objection, the court called Michael Thomas as its own witness. During his testimony, the witness read his statement to the jury. That statement indicated that on October 2, Appellant told his brother that he had to kill Mrs. Spurling because she had attacked him. The statement also included Appellant's admission that he had stolen a pair of diamond earrings and some gold chains, contradicting his testimony that he had not stolen anything from the house.

"Michael Thomas at trial again recanted the statement, testifying that he had given the officers a statement because he had been held at the police station for a long time and needed to tell them something in order to be released."

(1)

The appellant first contends that the trial judge (Hormes, J.) improperly precluded him from cross-examining two State's witnesses concerning Donald Spurling's allegedly violent character. During its case in chief, the State called David Bortle, one of the Spurling neighbors, solely for the purpose of identifying the murder weapon. On cross-examination, appellant questioned the witness about Donald's "temperament" and inquired whether the victim was "explosive" or acted "crazy" at times. The court sustained objections to this line of questioning. On the next day of trial, the State called Naomi Ward to testify about Sarah's activities on the night of her death. On cross-examination, the appellant asked whether Donald was "getting into a lot of fights from time to time." Again, the State's objection was sustained. Appellant argues that because he raised the issue of self-defense during opening argument, evidence of the victim's violent character was admissible to prove which of them was

the aggressor.

When the issue of self-defense has been properly raised in a homicide case, the character of the victim is admissible for two purposes. See Annot., 1 A.L.R.3d 571, 596-603 (1965); 1 Wharton's Criminal Evidence § 236 (13th ed. 1972); 1A Wigmore on Evidence § 63 (Tillers rev. 1983). First, it may be introduced to prove the defendant's state of mind when the victim was killed. Specifically, the character evidence may be used to prove that defendant had reasonable grounds to believe that he was in danger. Jones v. State, 182 Md. 653, 659, 35 A.2d 916 (1944). The accused may introduce evidence of the deceased's previous violent acts to prove that he had reason to perceive a deadly motive and purpose in the overt acts of the victim. To use character evidence in this way, the defendant first must prove: (1) his knowledge of the victim's prior acts of violence; and (2) an overt act demonstrating the victim's deadly intent toward the defendant. Gunther v. State, 228 Md. 404, 410, 179 A.2d 880 (1962); Jones v. State, supra, 182 Md. at 659-60. Second, the violent character of the victim may be introduced to corroborate evidence

that the victim was the initial aggressor. Williamson v. State, 25 Md. App. 338, 333 A.2d 653 (1975). It is not necessary to prove that the defendant had knowledge of the victim's reputation. Id. at 345. To use character evidence for this second purpose, however, the proponent must first establish an evidentiary foundation tending to prove that the defendant acted in self-defense. Id. at 345; 1 Jones on Evidence § 4:40 at 463-64 (1972); 1 Wharton's Criminal Evidence, § 236 at 510-11; 40 Am. Jur. 2d Homicide § 383 (1968). See Dixon v. State, 204 Md. 475, 484, 105 A.2d 243 (1954) (evidence concerning the "quarrelsome disposition" of the victim is properly excluded unless a proper foundation is laid).

Appellant maintains that the testimony about Donald's violent character which he sought to elicit on cross-examination was to be introduced for the second purpose. However, he acknowledges that no evidence supporting his self-defense claim was introduced until he took the stand in his own defense. Thus, no foundation was laid for the introduction of character evidence during the cross-examination of the State's witnesses. Consequently, the trial court did not err in sustaining the

State's objection to his line of questioning.[1]

Moreover, the questions asked of the two witnesses concerned subjects far beyond the scope of their direct testimony. It is well accepted that cross-examination ordinarily may only be used to explore the subject matter covered by the witness in his direct examination and for impeachment purposes. Williams v. Graff, 194 Md. 516, 522, 71 A.2d 450 (1950). See also Comm'n on Med. Discipline v. Stillman, 291 Md. 390, 435 A.2d 747 (1981); Shupe v. State, 238 Md. 307, 208 A.2d 590 (1965). David Bortle's direct testimony was limited to an identification of the murder weapon. Naomi Ward, in her direct testimony, gave an account of her activities with Sarah on the evening of the murders. She did not discuss Donald beyond acknowledging that she had met him. Questions about Donald's character were far afield from the direct testimony of both witnesses. Therefore, the trial court's disallowance of this cross-examination was not reversible error.

---

1. Because no foundation was laid, it is unnecessary to decide whether appellant's testimony alone would be a sufficient foundation. 1 Jones on Evidence, supra, § 4:40 at 464; Annot., 1 A.L.R.3d, supra, § 4(b); 40 Am. Jur. 2d Homicide, supra, § 303.

(2)

Appellant next claims that the trial court erred when it improperly admitted the expert testimony of an F.B.I. agent during the State's case on rebuttal. In its case in chief, the State had presented evidence that Sarah Spurling had been sexually assaulted either before or after she died. During cross-examination of Henry Wysham, a detective who supervised the police investigation, appellant questioned him about physical evidence collected at the crime scene and sent to the F.B.I. for analysis. At appellant's request, the F.B.I. reports containing analyses of this evidence were admitted as exhibits. Among the findings in the reports was a conclusion that a unique pubic hair retrieved from combings of Sarah's pubic region "could have originated" from appellant. No testimony about the contents of the reports was introduced at this time.

During its case on rebuttal, the State offered the testimony of the F.B.I. agent who prepared the report on the pubic hair comparison. After qualifying as an expert, the witness explained the process by which the pubic hairs of the appellant and the victim were compared

and he repeated the conclusions outlined in the report. Appellant made a timely objection to this testimony, claiming that it was improper rebuttal evidence. The objection was overruled. On appeal, the appellant contends that the admission of the agent's testimony was prejudicial error requiring a new trial. We disagree.

Rebuttal evidence includes any competent evidence which explains, contradicts or replies to any new matter raised by the defense. It is in the trial court's discretion to decide whether particular testimony constitutes proper rebuttal evidence; the court's ruling will not be reversed unless it is shown to be both "manifestly wrong and substantially injurious." Huffington v. State, 295 Md. 1, 14, 452 A.2d 1211 (1982), quoting State v. Hepple, 279 Md. 265, 270, 368 A.2d 445 (1977). See also Hayson v. State, 238 Md. 283, 208 A.2d 599 (1965); Lang v. State, 226 Md. 81, 172 A.2d 400 (1961), cert. denied, 369 U.S. 993 (1962); Keefer v. State, 143 Md. 151, 122 A. 30 (1923). Assuming arguendo that the F.B.I. agent's testimony was not introduced in response to any new matter raised by the defense, we are nevertheless

unable to find that the admission of such evidence warrants reversal. Unlike the prejudicial evidence admitted in Huffington, this testimony was merely cumulative. Huffington, supra, 295 Md. at 16. It duplicated evidence already introduced at trial at the request of the appellant; it did not add "an additional, different, and independent fact or circumstance upon which the jury could premise a finding of guilt." Id. In fact, it clarified for the jury evidence already introduced at the behest of the defense. The agent merely repeated the report's findings. There was no element of unfair surprise; appellant was familiar with the report's conclusions when he structured his case in defense. See VI Wigmore on Evidence § 1873 at 677-78 (Chadbourne rev. 1976). Additionally, the impact of the agent's testimony was so insignificant in light of the mass of direct and circumstantial evidence against the appellant that we can "declare a belief beyond a reasonable doubt that the error in no way influenced the verdict." Huffington, supra, 295 Md. at 16.

(3)

Appellant contends that the trial court erred

in refusing to strike a number of prospective jurors for cause. As a result, he claims that the jury which tried him was unable to render an impartial verdict.

Voir dire was conducted by counsel in chambers over a six-day period. Both sides made numerous motions to strike jurors for cause, many of which were granted. Of the twelve jurors and three alternates impanelled, appellant moved to strike for cause only three. He used only sixteen of the twenty peremptory challenges provided him by Maryland Rule 753 a 1, and he stated that the jury as constituted was acceptable to the defense.

The short answer to appellant's argument is that in the circumstances of this case any objection to the composition of the jury or the panel of talesmen was waived when he unequivocally indicated that the jury was acceptable to him. White v. State, 300 Md. 719, 481 A.2d 201 (1984); Calhoun v. State, 297 Md. 563, 579-80, 468 A.2d 45 (1983); Glover, Robinson & Gilmore v. State, 273 Md. 448, 452-53, 330 A.2d 201 (1975); Krajewski v. State, 156 Md. 149, 162, 144 A. 872 (1928). Furthermore, at the time the jury was impanelled, appellant had four peremptory

challenges remaining. He could have removed all three of the jurors who he now contends should have been excluded for cause. Because appellant failed to exhaust all of his peremptory challenges, his claims that the court erred in refusing to strike these jurors for cause are waived. Bever v. State, 4 Md. App. 436, 440, 243 A.2d 634 (1968); Annot., 72 A.L.R.2d 905, 908 (1960); 47 Am. Jur. 2d Jury § 218 (1969); 50 C.J.S. Juries § 256 (1947).[2]

(4)

Appellant next claims that the trial court abused its discretion when it called his brother Michael Thomas as a court witness at the State's request during the rebuttal phase of the State's case. The State sought to elicit testimony from Michael concerning incriminating admissions made to him by the appellant the day after the spurlings were killed. Michael had given a contemporaneous written statement to the police describing this incriminating

2. A review of the record reveals no indication that appellant was denied a fair trial by an impartial jury. All of the jurors indicated in voir dire that they would lay aside any preconceptions they might have and render a verdict based only on the evidence presented in the case. See Couser v. State, 282 Md. 125, 383 A.2d 389 (1978), cert. denied, 439 U.S. 852 (1978); Krajewski v. Baltimore Transit Co., 224 Md. 195, 167 A.2d 96 (1961); Garlitz v. State, 71 Md. 293, 18 A. 39 (1889).

conversation; however, he subsequently disavowed its truth. He claimed that the police extracted the statement by threatening to incarcerate him until he talked.

Under the rule against impeaching a party's own witness, the State could not vouch for the veracity of Michael's testimony and could not call him as a witness. Over appellant's objection, the court called Michael as its witness and conducted the direct examination, during which Michael denied that some of the incriminating statements attributed to the appellant were ever made. Both the State and the appellant were permitted to cross-examine the witness. During its cross-examination, the prosecution attempted to impeach Michael by reading to the jury the prior written inconsistent statement that he gave to the police. Subsequently, the court on its own motion admitted the written statement without objection from appellant. In its instructions to the jury, the court said:

> "[You] will recall on one occasion I did indeed call a witness and ask him some questions on my own. You should not read into my questions any feeling one way or the other regarding the issues in this case, nor are you to try to ascertain from my questions or conduct what I feel the verdict should be in this case."

Under Patterson v. State, 275 Md. 563, 342 A.2d 660 (1975), it lies within the sound discretion of the trial judge whether to call a person to testify as a court witness and that decision will not be reversed absent a clear abuse of discretion. Id.; Scarborough v. State, 50 Md. App. 276, 282, 437 A.2d 672 (1981). Clearly, there was no abuse of discretion in this case. Because of the rule preventing impeachment of a party's own witness, the adversary system failed to produce important evidence about a statement made by appellant shortly after the crimes were committed. The court could reasonably have found that this evidence was necessary to prevent a miscarriage of justice. Patterson, supra, 275 Md. at 577. Furthermore, Judge Hormes was "scrupulously careful" to preserve his impartiality in the eyes of the jury; he confined his questioning of Michael strictly to factual matters. Id. at 580. He also instructed the jury to draw no inference from the fact that Michael was called by the court instead of by one of the parties.

Appellant also contends that it was error "or

the court to allow Michael's written statement to be read to the jury without an instruction that the statement was to be used only for impeachment and not as substantive evidence. Appellant never requested a limiting instruction and we think the point has thus been waived. Maryland Rule 757 h; Hall v. State, 292 Md. 683, 441 A.2d 708 (1982). Moreover, both Michael's written statement and his testimony at trial were vague and internally contradictory. At most, the evidence might have been cumulative, and it is unlikely that it affected the jury's verdict in any way.

(5)

Appellant contends that the court erred when it prevented him from cross-examining the police officer in charge of the investigation about a statement that Ms. Wilkins might have made to the police.

The State called Detective Wysham to identify photographs of the crime scene as well as certain physical evidence. The witness did not testify on direct examination about any conversations with the rape victim. Indeed, his testimony indicated that he had not questioned her about the incident; she was interviewed by other officers.

On cross-examination, the appellant asked whether the victim had told the witness or other officers that she had resisted the attack. The court sustained timely objections by the State. Plainly, this line of questioning was far beyond the scope of the subject matter raised on direct examination and the court's ruling was correct. See Williams v. Graff, 194 Md. 516, 522, 71 A.2d 450 (1950).

(6)

Thomas' sixth claim of error concerns that part of the court's instructions to the jury wherein it was stated:

> "The return of the indictment by a Grand Jury raises no presumption whatsoever on the part of the Defendant. It is a mere formal charge necessary to place the Defendant upon trial. Any person who is accused of a crime comes into this Court with a presumption of innocence. That presumption remains with him throughout the trial. It is incumbent upon the State to offer you proof to show that the Defendant is guilty of the crime with which he's charged, and the degree of proof that is necessary for the State to offer you is that the Defendant is guilty beyond a reasonable doubt and to a moral certainty.
>
> "Each and every element of the crime charged must be proven by the State beyond

a reasonable doubt and to a moral certainty. That does not mean the State must prove a person guilty beyond all doubt and to a mathematical certainty. A reasonable doubt is not a very difficult term to explain, and I will make this explanation of reasonable doubt to you.

"If, after considering all the facts, you can say that you have an abiding conviction of the Defendant's guilt such as you would be willing to act without hesitation upon an important matter relating to your own affairs, then you have no reasonable doubt.

"Stating the same thing a little differently: The evidence is sufficient to remove a reasonable doubt when it convinces the judgment of an ordinarily prudent person of the truth of a proposition with such force that he or she would act upon that conviction without hesitation in his or her own most important affairs. That is the degree of proof that the State must produce in a criminal case in order to justify a verdict of guilty.

"As jurors, you must give due force to the presumption of innocence and proceed cautiously in weighing the evidence, and you are not commanded to be naive and to believe without scrutiny every glib suggestion, whether emanating from the State or from the Defense. An indispensable ingredient in judgment, in Court as well as out of it, is a modicum of common sense.

"I instruct you that the only burden carried by the accused in a murder trial is a burden of production, and it means simply that some evidence of mitigating

circumstances such as hot blood, which I will comment on later, or justification or excuse, such as self-defense, which I will comment on later, must be present either in the State's case or the Defense's case in order to justify a jury determination.

"Each juror is entitled to decide for himself or herself whether or not any doubt he or she may have is reasonable. If you are not convinced beyond a reasonable doubt of the guilt of the Defendant, then you have a duty to acquit him.

"The Defendant is not required to prove his innocence. The Defendant is entitled to every inference in his favor which can reasonably be drawn from the evidence. Where two inferences may be drawn from the same facts, one consistent with guilt and one consistent with innocence, the Defendant is entitled to the inference which is consistent with innocence." (Emphasis supplied.)

Later, the court instructed the jury that the appellant could not be convicted unless the State proved beyond a reasonable doubt that he had not acted in self-defense.

Appellant contends that the italicized instructions unconstitutionally shifted to him the burden of proving that he acted in self-defense in violation of principles enunciated in Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). We note, however, that appellant did not object at trial to the instruction

and his objection is therefore waived, absent a finding of "plain error" under Rule 757 h. See also Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980); State v. Hutchinson, 287 Md. 198, 411 A.2d 1035 (1980).

It is well settled that "when objection is raised to a court's instruction, attention should not be focused on a particular portion lifted out of context, but rather its adequacy is determined by viewing it as a whole." State v. Foster, 263 Md. 388, 397, 283 A.2d 411 (1971), cert. denied, 406 U.S. 908 (1972). To the same effect, see Poole v. State, 295 Md. 167, 186, 453 A.2d 1218 (1983). Viewing the instructions as a whole and in context, we find no error. Of course, an instruction stating tha. the defendant must prove self-defense would be improper. Squire v. State, 280 Md. 132, 368 A.2d 1019 (1977). The instruction in this case, however, does not shift the burden of proof to the defendant; the portion under scrutiny refers only to the "burden of production." Judge Hermes explicitly told the jurors that "the verdict cannot be murder unless you're convinced beyond a reasonable doubt that

the Defendant did not act in self-defense." The instruction placing the burden on the defendant to produce some evidence of self-defense in order to generate the issue was a correct statement of the law. See State v. Evans, 278 Md. 197, 208, 362 A.2d 629 (1976).

(7)

Appellant next complains that the trial court improperly restricted the scope of his closing argument, during which it sustained objections to two of his statements. We find no reversible error.

The law of Maryland is clear: the permissible scope of closing argument is a matter for the sound discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused and prejudicial to the accused. Wilhelm v. State, 272 Md. 404, 413, 326 A.2d 707 (1974). Our review of defense counsel's extensive closing remarks reveals no abuse of discretion or prejudice to appellant.

(8)

As a part of its case in chief, the State called Dr. Rudiger Breitenecker to testify about his examination

of Noel Wilkins shortly after the assault. In connection with the examination, Ms. Wilkins disclosed certain aspects of her medical history which were recorded in a report of the examination. Before Dr. Breitenecker took the stand, the State made a motion in limine to preclude appellant from referring at trial to certain items in the victim's medical history. Specifically, the State sought to prohibit inquiry into (1) whether Ms. Wilkins was a virgin and (2) whether she used a birth control device. In accordance with the Maryland rape shield law, Maryland Code (1982 Repl. Vol.) Art. 27, § 461A,[3] the court conducted

3. This section provides:

"(a) Evidence relating to victim's chastity.--Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for commission of a rape or sexual offense in the first or second degree. Evidence of specific instances of the victim's prior sexual conduct may be admitted only if the judge finds the evidence is relevant and is material to a fact in issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value, and if the evidence is:

(1) Evidence of the victim's past sexual conduct with the defendant; or
(2) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma; or
(3) Evidence which supports a claim that the victim has an ulterior motive in accusing the defendant of the crime; or
(4) Evidence offered for the purpose of impeachment when the prosecutor puts the victim's

an in camera review of the evidence. Appellant argued that the medical history was relevant to and probative of his contention that Ms. Wilkins consented to intercourse with him and that she "liked sex with black men." The court ruled that appellant's proffer failed to demonstrate that the evidence was relevant and granted the State's motion. The court indicated that it would change its ruling if evidence was presented subsequently which made the victim's prior sexual activity relevant.

Before us, appellant does not contend that the trial court misapplied § 461A. Nor does he claim that § 461A is unconstitutional on its face. Rather, he argues that the shield law, as applied in this case, violated his sixth amendment right to confront and cross-examine the witnesses against him. In effect, appellant claims that the exclusion of this evidence deprived him of the ability to present an effective defense and that consequently he is entitled to a new trial. We disagree.

3. (contd.)

(b) In camera hearing.--Any evidence described in subsection (a) of this section, may not be referred to in any statements to a jury nor introduced at trial without the court holding a prior in camera hearing to determine the admissibility of the evidence. If new information is discovered during the course of the trial that may make the evidence described in subsection (a) admissible, the court may order an in camera hearing to determine the admissibility of the proposed evidence under subsection

Decisions on the relevance of evidence rest in the sound discretion of the trial court and will not be reversed absent a showing that such discretion was clearly abused. See Durkin v. State, 284 Md. 445, 453, 397 A.2d 600 (1979); City of Baltimore v. Zell, 279 Md. 23, 28, 367 A.2d 14 (1977); Corbi v. Hendrickson, 268 Md. 459, 468, 302 A.2d 194 (1973). We find no abuse of discretion here. It is well accepted that evidence of the victim's specific prior sexual acts with persons other than the defendant is not relevant to prove that she consented to intercourse with the defendant. Johnson, Jr. v. State, 232 Md. 199, 206, 192 A.2d 506 (1963); Giles v. State, 229 Md. 370, 380, 183 A.2d 359 (1962), appeal dismissed, 372 U.S. 767 (1963); Shartzer v. State, 63 Md. 149, 152 (1885). See generally Annot., 94 A.L.R. 3d 257 (1979). That is not to say, however, that prior specific sexual acts of the victim may not be relevant for other purposes. See Art. 27, § 461A(a)(1)-(4). But the evidence appellant sought to offer clearly was without relevance. Evidence concerning Ms. Wilkins' virginity or use of a birth control device does not tend to prove

or disprove that she liked sex with black men and consented to intercourse with the appellant. This evidence was irrelevant and properly excluded.

Since the trial court ruled correctly that the evidence was irrelevant, its exclusion did not violate appellant's constitutional rights. Of course, rape shield laws may not be used to exclude probative evidence in violation of a defendant's constitutional rights of confrontation and due process. Bell v. Harrison, 670 F.2d 656 (6th Cir. 1982). But a defendant has no constitutional right to present irrelevant evidence at trial. Doe v. United States, 666 F.2d 43 (4th Cir. 1981); Pratt v. Parratt, 615 F 2d 486 (8th Cir. 1980), cert. denied, 449 U.S. 852 (1980); United States v. Kasto, 584 F.2d 268 (8th Cir. 1978), cert. denied, 440 U.S. 930 (1979); Marion v. State, 267 Ark. 345, 590 S.W.2d 288 (1979); People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978); People v. Arenda, 416 Mich. 1, 330 N.W.2d 814 (1982); State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980); Annot., 1 A.L.R.4th 283, § 2 at 287 (1980). Where the probative value of the

evidance is outweighed by the State's interest in protecting the rape victim from harassment and humiliation at trial, its exclusion does not violate the defendant's right of confrontation, his right to present an effective defense or his right to due process of law. See Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); United States v. Kasto, supra; Marion v. State, supra; People v. Arenda, supra; State v. Gardner, 59 Ohio St. 2d 14, 391 N.E.2d 337 (1979). In this case, the evidence was irrelevant, but assuming arguendo that it possessed some relevance, it was far outweighed by the sound public policy supporting § 461A. Furthermore, since this evidence had no bearing on appellant's contantion that the victim consented to have intercourse with him, its exclusion caused him no prejudice. We conclude, therefore, that § 461A, as applied to appellant in the circumstances of this case, is not unconstitutional.[4]

4. Appellant's reliance on Schockley v. State, 585 S.W. 2d 645 (Tenn. Crim. 1978), is misplaced. In that case, the State tried to prove that the victim became pregnant as a result of the rape. At trial, the defendant was precluded by the Tennessee rape shield law from offering evidence that the victim had sexual relations with other men around the date that the rape allegedly occurred. The court held that it was error to construe the law in this way.

Clearly, Schockley is distinguishable. There, the evidence was relevant to disprove the defendant's criminal

(9)

Next, appellant claims that the court improperly admitted evidence tending to prove the good character of the victim, Sarah Spurling. The State called Naomi Ward to testify about Sarah's activities just prior to her death. During direct examination, the witness was asked to describe Sarah "from your relationship with her." Appellant's objection to the inquiry was overruled, after which the witness described Sarah as "a very vivacious person," a dedicated nurse, and a friendly person, liked by all who knew her. Asked whether Sarah ever talked about her child, the witness, over appellant's objection, said, "Yes, she talked about her a lot." Appellant argues that he is entitled to a new trial because this evidence was irrelevant and prejudicial. We disagree.

It is true that, generally, the character of the homicide victim is irrelevant unless, as we discussed earlier, the defendant raises a claim of self-defense. See 1 Wharton's Criminal Evidence § 236 at 510 (13th ed. 1972). Appellant did not plead self-defense in the death of Sarah Spurling. Nevertheless, even if the challenged

4. (contd.) of "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma."

testimony was irrelevant, it was so inconsequential and meaningless as to have had no impact upon the outcome of the case. Of course, "the admission of irrelevant evidence will not require reversal if it appears that the evidence was not prejudicial." Hopkins v. State, 193 Md. 489, 499-500, 69 A.2d 456 (1949), appeal dismissed, 339 U.S. 940 (1950). Because we find that appellant was not prejudiced by this evidence, its admission does not necessitate a new trial.

(10)

Appellant alleges that there was insufficient evidence to support his conviction for the first degree sexual offense of forcing Ms. Wilkins to perform fellatio upon him. He argues that Code, Art. 27, § 554, as interpreted in Gooch v. State, 34 Md. App. 331, 367 A.2d 90 (1976), requires proof that the sexual organ penetrated the mouth. The evidence presented at trial indicated that Ms. Wilkins was forced to "kiss" appellant's penis. Since there was no showing that the mouth was penetrated, he argues that the evidence was insufficient to support the first degree sexual offense conviction.

Appellant's contention is meritless. Section 554 pertains to the crime of "unnatural or perverted sexual practices"; he was not charged with violating this law. Rather, appellant was convicted of a first degree sexual offense as set forth in § 464(a) of Art. 27, which provides:

> "A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With another person by force or threat of force against the will and without the consent of the other person, and:
>
> (i) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous or deadly weapon; or
>
> (ii) Inflicts suffocation, strangulation, disfigurement, or serious physical injury upon the other person or upon anyone else in the course of committing the offense; or
>
> (iii) Threatens or places the victim in fear that the victim or any person known to the victim will be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
>
> (iv) The person commits the offense aided and abetted by one or more other persons."

The term "sexual act," as used in this section, is defined

by Art. 27, § 461(e) to include "fellatio" -- a word not defined in the statute. We think that the legislature intended to give "fellatio" its common, ordinary and well-accepted meaning. Black's Law Dictionary 743 (4th ed. rev. 1968) defines fellatio as an "offense committed with the male sexual organ and the mouth." See also People v. Sohmers, 55 Misc. 2d 925, 286 N.Y.S.2d 714, 717 (Crim. Ct. 1967); State v. McParlin, 422 A.2d 742, 743 n. 2 (R.I. 1980). Webster's Third New International Dictionary gives the following definition: "the practice of obtaining sexual satisfaction by oral stimulation of the penis." Under the general view, proof of penetration is not required; all that must be shown is some contact between the mouth and the male organ. Carter v. State, 122 Ga. App. 21, 176 S.E.2d 238 (1970); State v. Phillips, 365 So.2d 1304 (La. 1978), cert. denied, 442 U.S. 919 (1979); McDonald v. State, 513 S.W.2d 44 (Tex. Crim. App. 1974). Therefore, we hold that fellatio, within the meaning of § 461(e), encompasses the oral contact with the male sex organ involved in this case. Since there was ample evidence to support the jury's verdict on the first degree sexual offense, we conclude that appellant is not entitled to a new trial on this issue.

Sentencing Issues

(a)

Appellant contends that the trial judge erred in admitting the testimony and report of the State's psychiatric expert, Dr. Michael Spodak, at the sentencing phase of the proceedings. He claims that the admission of this evidence violated his fifth, sixth and fourteenth amendment rights.

The record discloses that Dr. Spodak, a member of the staff of Clifton T. Perkins State Hospital, participated in the pretrial evaluation of the appellant on February 4, 1982, following his plea of insanity and incompetency to stand trial. Earlier, in January of 1982, Dr. Spodak conducted a psychiatric one-on-one examination of appellant at the hospital and filed a full "psychiatric case workup report." At the sentencing hearing before Judge Hormes (a jury determination having been waived), Dr. Spodak testified that prior to his initial examination of appellant, he told him that "any information he revealed would not be held in confidence and might be used in testimony or in written reports"; and that "the State was seeking the death penalty and [I] advised him that anything that he discussed

with me were he to be found guilty might be used in subsequent testimony at a sentencing proceeding." Asked whether appellant understood that explanation, Spodak testified that appellant "said he did understand that they were seeking the death penalty and that anything he told me would not be held in confidance." Spodak further testified that following this explanation, appellant willingly proceeded with the interview.[5]

After appellant had been found guilty at trial, the State petitioned the court for permission to conduct a "Presentence psychiatric evaluation" of the appellant. The State's petition referred to the earlier psychiatric evaluation of the appellant at the Perkins Hospital which found that appellant was criminally responsible and competent to stand trial. The petition also stated that it was desirable to supplement the appellant's original insanity evaluation with further interviews "to develop material for presentation at sentencing"; that Dr. Spodak,

5. Spodak's written report, received in evidence, also reflected that he told appellant that the State was seeking the death penalty; "that any information he disclosed might be testified to at a sentencing phase of his trial depending on the outcome"; and that prior to the psychiatric evaluation, "the defendant indicated that he clearly understood that any information he disclosed might be used for that purpose."

who participated in the insanity evaluation, could conduct the further psychiatric examination; and that appellant's counsel had no objection to the evaluation. The court approved the State's petition and Dr. Spodak thereafter interviewed appellant on November 27, 1982 at the jail, telling him at that time that he had been "retained by the State's Attorney's Office . . . to evaluate him on certain issues about the death penalty, and that depending on what he said and depending on my findings, I might very well be called as a witness to testify at the sentencing phase." Dr. Spodak testified that appellant indicated that he understood the explanation and was willing to be interviewed at that time.

At the sentencing hearing, the State sought to introduce Dr. Spodak's report and testimony concerning his post-trial psychiatric examination of the appellant. Appellant's counsel objected on the ground that he was under the impression that "Dr. Spodak would see [the appellant] as a member of the staff of Clifton T. Perkins" while, in actuality, he conducted the examination as "a paid doctor by the State's Attorney's Office"; that had

he known of this fact, he would not have permitted the examination and would have advised the appellant "not to discuss any matters with Dr. Spodak so long as he was then in the employ of the State's Attorney's Office . . . [because] the Doctor is no longer a pure objectionist, but is a paid person whose views obviously more than likely reflect the views sought by his employer." The court overruled the objection, stating that Dr. Spodak was a qualified forensic psychiatrist and "it makes no difference who pays him . . . [since] nobody and no amount of money is going to cause him to change his opinion." Thereafter, Dr. Spodak's report and testimony were received in evidence; they negated the existence of two possible mitigating circumstances under Art. 27, § 413(g)(4) and (7), i.e., that the murders of Donald and Sarah Spurling were not committed "while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance or intoxication"; and that it was not "unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society."[6]

---

6. A copy of Dr. Spodak's report was given to appellant

Appellant acknowledges that under Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982), Perkins' psychiatrists are deemed to be wholly impartial experts and not partisans of the prosecution, even though paid by the State. The "crucial point," according to appellant, is that nowhere in the State's petition was it suggested that Spodak would be functioning as other than a Perkins' psychiatrist; and he relies for reversal upon Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

In Estelle, the issue was "whether the prosecution's use of psychiatric testimony at the sentencing phase of respondent's capital murder trial to establish his future dangerousness violated his constitutional rights." 451 U.S. at 456. There, the trial judge, prior to trial, sua sponte and without notifying the defendant's counsel, ordered that the defendant be examined by a psychiatrist to determine his competency to stand trial. The psychiatrist filed a report with the court indicating that the defendant was competent. Subsequently, the defendant was convicted. At the sentencing phase of the capital proceeding, the State was required to prove as a condition precedent to imposition of the death penalty that

there was a probability beyond a reasonable doubt that the defendant would be dangerous in the future. The State called the psychiatrist as its witness. Based solely on his pretrial psychiatric examination of the defendant, the psychiatrist testified affirmatively as to the defendant's future dangerousness.

The Supreme Court first addressed the issue whether, in the circumstances, the psychiatrist's testimony violated the defendant's fifth amendment privilege against compelled self-incrimination because the defendant was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at the capital sentencing proceeding. The Court concluded that the ultimate penalty of death was a potential consequence of what the defendant told the psychiatrist; that any effort by the State to compel the defendant to testify against his will at the sentencing hearing would contravene the fifth amendment; and thus the State's effort to establish the defendant's future dangerousness by relying on "the unwarned statements" made to the psychiatrist infringed the fifth amendment. Id. at 462-63.

In this connection, the Court pointed out that the psychiatrist's diagnosis as to future dangerousness was not based solely on his observation of the defendant but rather upon statements made, and not made, by the defendant in his recital of the details of the crime. The Court emphasized that simply because the defendant's statements "were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment." Id. at 465. The results of the examination, the Court said, were used by the State for purposes far beyond merely establishing the defendant's competency to stand trial;[7] they were used instead to establish the "critical issue" of respondent's future dangerousness, proof of which beyond a reasonable doubt was prerequisite to imposition of the death penalty. Thus, the Court said that because the State satisfied its burden of proof by using the defendant's "own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty,"

---

7. The Court indicated, 451 U.S. at 465, that the fifth amendment would not have been implicated had the psychiatrist's findings been used only to determine defendant's competency to stand trial or whether he was criminally responsible.

the fifth amendment privilege applied in such "distinct circumstances." Id. at 466. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) was cited as authority, the Court stating that "[t]he considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here." Estelle, supra, 451 U.S. at 467. The Court contin

> "That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When [the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." Id.

Further on in its opinion, the Court said:

> "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent

> to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [the psychiatrist] to establish his future dangerousness." Id. at 468.

The Court concluded that the defendant's statements to the psychiatrist "could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them."[8] Id. at 469.

As to the sixth amendment right to counsel, the Court said that the issue was whether the right was abridged when the defendant was not given a prior opportunity to consult with counsel about his participation in the pretrial psychiatric examination. The Court held that as counsel was not notified that the psychiatric examination would encompass the issue of future dangerousness, and because the defendant was denied the assistance of counsel in making the significant decision of whether to submit to the examination, and to

---

8. In n. 13, 451 U.S. at 469, the Court remarked: "Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination."

what and the psychiatrist's findings could be used, the sixth amendment right to counsel was violated. Id. at 471. In n. 16, id. at 471, the Court indicated that a waiver of the constitutional right to the assistance of counsel could be found where there was a voluntary, knowing and intelligent relinquishment or abandonment of the known sixth amendment right.

We think it clear that appellant's objection to Dr. Spodak's testimony and report was not based on constitutional principles enunciated in Estelle but rather was predicated solely on a non-constitutional basis, i.e., that in conducting the post-trial evaluation, Dr. Spodak was not a neutral expert, as appellant's counsel thought when he consented to the interview, but was paid by the prosecution; and because the psychiatrist was biased against the appellant, the evidence was inadmissible. It is, of course, well settled that "where specific grounds are delineated for an objection, the one objecting will be held to those grounds and will ordinarily be deemed to have waived grounds not specified." Jackson v. State, 288 Md. 191, 196, 416 A.2d 278 (1980). See also Mays v. State, 283 Md. 548, 554, 391 A.2d 429 (1978);

State v. Kidd, 281 Md. 32, 39, 375 A.2d 1105 (1977); von Lusch v. State, 279 Md. 255, 263, 368 A.2d 468 (1977). We think appellant's objection was one going to the weight, rather than the admissibility of Dr. Spodak's testimony and report; accordingly, we find no error in the admission of this evidence.

Assuming arguendo that the objection was constitutionally grounded in the principles of Estelle, we nevertheless find no error in the circumstances of this case. Maryland's capital penalty statute, unlike the Texas statute involved in Estelle, takes account of the defendant's future dangerousness only by way of a mitigating circumstance -- whether it is unlikely that the defendant will be dangerous in the future. The State does not bear the burden of proving the nonexistence of mitigating circumstances, Tichnell v. State, 287 Md. 695; thus, the appellant's words were not used against him on a matter upon which, as in Estelle, the prosecution held the burden of proof. Moreover, during appellant's original psychiatric evaluation by Dr. Spodak, he was told that any information which he revealed to the psychiatrist would not be held in confidence but could be

used at a subsequent capital sentencing hearing. Unlike counsel in Estelle, appellant's lawyer had prior notice of both examinations by Dr. Spodak and had the opportunity to confer with appellant before each examination. The Miranda-type warnings given to appellant prior to his initial examination were wholly absent in Estelle -- another distinguishing feature between that and the present case. Equally clear is the fact that appellant's counsel was advised prior to agreeing to the evaluation that the post-trial examination by Dr. Spodak was intended to develop material for presentation at the sentencing hearing. In the circumstances, even if appellant's counsel was honestly mistaken in the belief that Dr. Spodak would evaluate the appellant in his capacity as a Perkins' psychiatrist, that fact alone would not require reversal under the principles of Estelle. We thus conclude, on the record in this case, that appellant's fifth, sixth and fourteenth amendment rights were not violated by the admission into evidence of Dr. Spodak's report and testimony.

(b)

The State called two witnesses to testify at the sentencing hearing about appellant's prior unrelated criminal activity. Because appellant was not prosecuted on either occasion, this testimony related to crimes for which there were neither convictions nor pleas of guilty or nolo contendere. Thus, appellant argues that this evidence was inadmissible under Article 27, § 413(c)(1)(iii),[9] as interpreted in Scott v. State, 297 Md. 235, 465 A.2d 1126 (1983).

Baltimore City Police Officer Bruce Tyler testified about a shooting in July of 1981. He said that appellant had become involved in a disturbance at a liquor store, as a result of which he was ejected from the store by the owner; that appellant thereafter threatened the owner who pulled out a pistol and fired a warning shot;

---

9. The section provides:

> "(c) Evidence; argument; instructions.--(1) The following type of evidence is admissible in this proceeding:
> (i) . . .
> (ii) . . .
> (iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures."

and that because the warning shot did not deter the appellant, the owner fired another shot which struck the appellant in the chest. Appellant was not charged with any crime. He objected to the witness' testimony on the ground that it was hearsay. The objection was overruled.

As we have already observed, our cases make plain that where specific grounds for an objection are given, the party objecting is held to those grounds and all others not specified are waived. Here, appellant based his objection on the claim that the witness' testimony was hearsay. Any objection to the evidence as inadmissible under § 413(c)(1)(iii) was waived. Thus, this issue was not properly preserved on appeal. See Calhoun v. State, 297 Md. 563, 601, 468 A.2d 45 (1983).

Several minutes later, after most of the details about the liquor store incident had been disclosed, appellant stated to the court that it was necessary "to try this case," referring again to the same incident. The court responded by stating that it had no intention of doing so, but rather would only rule on the appellant's objections. As already

indicated, the objection failed to specify § 413(c)(1)(iii) as the grounds for excluding this evidence. We said in Calhoun, supra, 297 Md. at 601:

> "In the absence of an objection focusing on the point before the Court in Scott, the evidence here was admissible under Art. 27, § 413(c)(1)(v), which permits introduction of, 'Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.'"

Later, the State called Carol Alston and proferred that she would testify that in March of 1980 appellant attempted to steal her purse. Appellant's counsel objected "to the whole line of questioning . . . that this witness is called to give." The court overruled the objection, stating that it had "to get into one item at a time." Appellant later indicated in a colloquy with the court that the basis for the objection was relevance. The court said: "I don't think this testimony has any probative value at all other than at most minimally a little bit of cumulative stuff as to Mr. Thomas' background." The court supplemented its statement, saying "I just don't want to get into something that's really hesitant," to which the appellant responded:

"That's why I objected initially." Thus, appellant did not contend that the evidence was inadmissible under § 413(c)(1)(iii). An objection based on § 413(c)(1)(v) to the relevance of testimony does not constitute an objection under § 413(c)(1)(iii). Scott, supra, 297 Md. at 245; Johnson, supra, 292 Md. at 441. Thus, the issue is not preserved for appellate review. In the absence of an objection focusing on the exclusion of evidence by § 413(c)(1)(iii), evidence of unrelated prior activities that did not result in a conviction, guilty plea or plea of nolo contendere are admissible under § 413(c)(1)(v). Calhoun, 297 Md. at 601.

(c)

Appellant was twenty-three years of age when the murders were committed. He contends that his youthfulness should have been found to constitute a mitigating circumstance at the sentencing hearing, and that the trial court's failure to so find was error.

Section 413(g)(5) of Article 27 directs the sentencing authority to determine, by a preponderance of the evidence, whether "[t]he youthful age of the defendant at the time of the crime" was a mitigating circumstance.

Stebbing v. State, 299 Md. 331, 361, 473 A.2d 903 (1984);

Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830 (1980). We first discussed the appropriate standard for reviewing this question in Stebbing. We there applied an analysis analogous to that used in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), for reviewing the legal sufficiency of the evidence to support a conviction. Stebbing, supra, 299 Md. at 361. We said:

> "[T]he standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational sentencing authority could have concluded that the accused failed to prove the claimed mitigating circumstance by a preponderance of the evidence." Id. (emphasis in original).

Like appellant in the instant case, Stebbing claimed that the sentencing court erred when it failed to find youthful age as a mitigating circumstance. She was nineteen years old at the time the crime was committed. We observed that

> "the mitigating circumstance of youthful age is not measured solely by chronological age. Had the General Assembly meant to establish an age at or below which the death penalty could not be imposed, it could have so specified."[10]

10. We noted in Stebbing that the legislature had rejected one amendment to §§ 412-14 prohibiting imposition of the death penalty on those under 18 and another precluding its application to individuals 25 years old or younger. Stebbing, supra, 299 Md. at 367 n. 9. See 1 Maryland Senate Journal 984-85 (1978).

In addition to her chronological age, Stebbing's extensive prior criminal record, her below average IQ, and her marriage seven months before were considered. We ruled that there was no error in failing to find xxxxxxxxxx xxxxxxx that youthfulness was xxx proved as a mitigating circumstance. 299 Md. at 369.

In the instant case, appellant introduced evidence that he had a below normal IQ and had suffered a serious head injury during his early teens; that he was the product of a broken home and had been a victim of child abuse; that his mother was a chronic alcoholic who died when appellant was a teenager; and that his father deserted the family early on. It was also shown that appellant fathered two children and has a history of drug and alcohol abuse. Prior to the murders, appellant had been convicted in 1976 for robbery.

In passing sentence upon appellant, the court considered all of these factors. It found that his family background was a mitigating circumstance under § 413(g)(8).[11] The court also accepted appellant's

---

11. That provision requires the sentencing authority to consider

> "[a]ny other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case."

claim, made during closing argument, that he had a "mental age" of fourteen or fifteen, though no such evidence was presented. Upon weighing all of the evidence presented to it, the court found that youthfulness as a mitigating factor did not exist. We find no error in the court's ruling. See Trimble v. State, 300 Md. 387, 478 A.2d 1143(

Appellant contends that Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), demands a different result. We disagree. The defendant in that case, a sixteen-year-old, was convicted of killing a state highway patrol officer. He presented a substantial amount of evidence about his violent background but the court refused to consider it. The Supreme Court said:

> "[I]t is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that as a matter of law he was unable even to consider the evidence."
> 455 U.S. at 113 (emphasis in original).

The Court held that the sentencer may not refuse to consider, as a matter of law, any mitigating evidence. Id.

at 113-14. In contrast, Judge Hormes in the present case carefully considered all of appellant's evidence on the issue of youthfulness as a mitigating circumstance; he found that this factor was not proved by a preponderance of the evidence. Thus, the court's conclusion is in no way inconsistent with Eddings.

(d)

Appellant next contends that the trial court misapplied the provisions of § 413. The record reveals that, with respect to both murders, the court followed statutorily mandated procedures. In establishing the appropriate sentence for each murder, the court found beyond a reasonable doubt the aggravating factor, as authorized by § 413(d)(9), that the appellant "committed more than one offense of murder in the first degree arising out of the same incident." With respect to Donald's murder, the court did not find the presence of any of the statutorily enumerated mitigating factors. It did find that "motive to kill," demographic characteristics and background of the defendant were mitigating circumstances in Donald's killing under § 413(g)(8) and that they outweighed the aggravating circumstance; a life

sentence was imposed. Regarding Sarah's murder, the court again found that none of the statutorily enumerated mitigating factors had been proved by a preponderance of the evidence. It found that appellant's family background and demographic characteristics constituted mitigating factors under § 413(g)(8) but concluded that they did not outweigh the statutory aggravating factor. Accordingly, the court concluded that, under § 413(h)(2), the proper sentence was death. The court's findings were made in writing and signed. We find no error in the trial court's application of § 413.

(e)

Proportionality Review

As required by Article 27, § 414(e)(4), we next consider the question "whether the sentence of death [imposed upon appellant for Sarah's murder] is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

The principles governing proportionality review of a death sentence in Maryland have been stated in a number of our cases. Stebbing v. State, 299 Md. 331, 473 A.2d 903 (1984); Colvin v. State, 299 Md. 88, 472 A.2d 953 (1984); Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983);

Tichnell v. State, 297 Md. 432, 468 A.2d 1 (1983). The fundamental object of the statutorily mandated appellate review process is the avoidance of the arbitrary or capricious imposition of the death penalty by affording similar treatment to similar capital cases. Tichnell, 297 Md. at 466. The focus of § 414(e)(4) is upon capital cases in which the sentencing authority determined to impose a life or death sentance; the subsection aims to assure that upon consideration of both the crime and the defendant the aggravating and mitigating circumstances present in one capital case will lead to a result similar to that reached under similar circumstances in another capital case, thus identifying the aberrant sentance and avoiding its ultimate imposition. Id. at 465. Our procedure is to review all reports filed by trial judges in capital sentencing cases, as required by Maryland Rule 772A, and to select those which we deem "similar" within the contemplation of the statute.

The appellant's case is the only one within the relevant inventory of capital cases in which the sentencing authority found, as the sole aggravating circumstance, that the defendant had "committed more than one offense of

murder in the first degree arising out of the same incident." § 413(d)(9). Judge Hormes, as the sentencing authority, was unable to conclude that the other aggravating circumstances relied upon by the State -- robbery or attempt to rob Donald Spurling and the commission or attempted commission of rape or sexual offense in the first degree upon Sarah (§ 413(d)(10)) -- had been established beyond a reasonable doubt, even though the jury had convicted the appellant both of premeditated and felony murder, the latter based upon findings that these aggravating factors had been proved. In imposing a life sentence for Donald's murder, Judge Hormes found the existence of several nonstatutorily enumerated mitigating factors under the "catch-all" provisions of § 413(g)(8), i.e., "demographic characteristics and background of defendant" and "motive to kill." In this latter finding, Judge Hormes, in his sentencing remarks, stated that the victim had invited the appellant to his home on the night of the crime and that the evidence that the appellant robbed or attempted to rob Donald was not convincing beyond a reasonable doubt. In imposing a death sentence for Sarah's murder, Judge Hormes again

found the existence of "demographic characteristics and background of defendant" as mitigating circumstances. In his sentencing remarks, Judge Hormes said that Sarah had been sexually molested by the appellant, but he could not find, beyond a reasonable doubt, that she had been raped or was the victim of a sexual offense in the first degree while she was alive. However, he found, as to Sarah's murder, that the mitigating circumstances did not outweigh the aggravating circumstances.

The appellant contends that the death sentence imposed upon him for Sarah's murder was excessive and disproportionate to the penalty imposed in a number of other more repugnant cases where only life sentences were imposed. He also contends that his death sentence was disproportionate because the two murders were not substantially different and thus it was inequitable to sentence him to death for one murder and life for the other.

The appellant was twenty-three years old at the time of the crime. Earlier, he had been convicted of robbery. The crime scene was one of great violence, as demonstrated by the numerous pictorial exhibits in the case.

Donald Spurling had been stabbed twenty-two times: one stab wound penetrated six or seven inches through his heart. Sarah Spurling had been stabbed fifteen times over various parts of her body. She was nude from the waist down except for her panties, the crotch of which had been cut or torn away. She had been sexually molested, as had Noel Wilkins, the boarder, who had been raped at knife point during the same criminal episode that resulted in the deaths of Donald and Sarah. Both the jury and the sentencing authority rejected appellant's claim of self-defense in the killing of Donald. Manifestly, they gave no credence to appellant's testimony that he did not remember killing Sarah. Indeed, the physical evidence at the crime scene attested to a savage and violent attack upon Sarah by one intent upon murdering her -- hardly the frenzied attempt to escape from Sarah suggested by appellant in argument before us.

We have carefully reviewed the relevant inventory of capital sentencing cases and have selected a number which we deem similar to that of the appellant, bearing in mind, of course, that simply because dissimilarities exist

between cases does not mean that the Court is powerless to complete the comparative review process contemplated by § 414(e)(4). Manifestly, to so conclude would inappropriately ascribe to the legislature an intention not to enact an effective or operative death penalty statute. See Tichnell, supra, 297 Md. at 471.

John Huffington. The defendant, almost nineteen years old at the time of the crimes, and a dealer and user of drugs, together with an accomplice, abducted the victim from his mobile home and shot him five times in the back and head, thereafter stealing drugs from his person. Huffington immediately returned to the victim's home where he murdered another individual while she was asleep, by striking her with a bottle and stabbing her thirty-three times. The defendant then took money and drugs from the home and fled. Two statutory aggravating circumstances were charged and established, i.e., that the defendant committed more than one first degree murder arising out of the same incident and that he committed both murders in the course of a robbery. The mitigating circumstances were that the defendant was of youthful age and had not

been previously found guilty of a crime of violence. A death sentence was imposed.[12] While the sentence has not as yet been reviewed by this Court, it is presumptively correct. See Stebbing v. State, supra, 299 Md. at 376.

Robert Brantner. The defendant, age for[illegible]one at the time of the offenses, set fire to a home re[illegible]ting in the death of three individuals. Two statutory aggravating circumstances were found to exist, i.e., that the defendant committed more [illegible]e first degree murder arising out of the same incident and that the murders were committed in the course of an arson. The mitigating circumstances found were that the defendant had no prior record and committed the crimes while his mental capacity was substantially impaired. Life sentences were imposed.

Willie Green. The defendant, age forty at the time of the crimes, together with an accomplice, murdered two employees of a restaurant in the course of a robbery. The victims were both stabbed to death; one victim had his hands tied behind him and his throat was slit. Two aggra-

12. At an earlier trial for the same offenses, Huffington was found guilty and sentenced to death where the same aggravating and mitigating circumstances were established. Finding evidentiary error at the trial, we reversed these convictions. See Huffington v. State, 295 Md. 1, 452 A.2d 1211 (1982).

vating circumstances were found to exist, namely, that Green committed more than one murder in the first degree arising out of the same incident and that the murders were committed during the commission of a robbery. The mitigating circumstances were that the defendant was not the sole proximate cause of the deaths of the victims and that it was unlikely, in view of his age, that he would engage in further criminal activity. The trial court, as sentencing authority, found by a preponderance of the evidence that the mitigating factors outweighed the aggravating factors. Life sentences were imposed.

Vernon Evans, Jr. The defendant, thirty-three years old at the time of the crime, was employed by Anthony Grandison to murder two witnesses scheduled to appear against Grandison in a federal criminal trial. Utilizing an automatic pistol equipped with a silencer, the defendant entered the lobby of a motel where he was told the witnesses worked. The defendant there shot to death two persons whom he believed to be the targeted witnesses. Two statutory aggravating circumstances were charged and established, i.e., that the defendant committed the murders pursuant to an agreement or contract for remun-

eration or the promise of remuneration to commit the murders; and that the defendant committed more than one first degree murder arising out of the same incident. The sole mitigating circumstance found to exist was "drug addiction." A death sentence was imposed by the jury for each murder. While neither sentence has as yet been reviewed by us, the sentences are presumptively correct under Stebbing v. State, supra, 299 Md. at 376.

Howard Hines. The defendant, age twenty-five at the time of the crime, accosted a twenty-two year old college student while she was walking, stabbed the victim forty to fifty times, sexually assaulted and ultimately strangled her to death. The statutory aggravating circumstance was that the murder was committed in the commission of or attempt to commit rape; the mitigating circumstance was that Hines committed the offense while he was substantially impaired due to mental incapacity. The trial judge's report indicated that Hines had a "thought disorder, bearing schizophrenic-like characteristics." A life sentence was imposed.

Theodore Wiener. The defendant, nineteen and one-

half years old at the time of the crime, raped a twenty-two year old victim, after which he stabbed her 101 times, nearly decapitating her and causing her death. First degree rape was the only aggravating factor. Mitigating factors found to exist were a lack of a prior record of a crime of violence, substantially impaired mental capacity, and youthful age. A life sentence was imposed upon a finding that the mitigating factors outweighed the aggravating circumstance.

Additionally, the cases of Elvis Horton and John Kevin Johnson, especially relied upon by appellant, bear brief review. Horton, age thirty-six at the time of the offense, raped, bludgeoned and strangled to death a twelve year old victim. Johnson, age twenty-six when the offense was committed, kidnapped, raped and sodomized a thirteen year old victim, and thereafter shot her to death and threw her body over a bridge. In each of these cases the sentencing jury deadlocked, thus preventing any findings on matters of aggravation and mitigation and suggesting that one or more jurors determined to show mercy. As we observed in Stebbing v. State, 299 Md. at 380, the individ-

ualized decision in those cases to show mercy does not mean that the sentence under review is excessive or disproportionate.

Considering the crimes committed by the appellant in this case, as well as the appellant himself, in light of the aforegoing "similar" cases, we cannot conclude that the death sentence imposed upon him was excessive or disproportionate. In so concluding, we are in no way convinced that the life sentence imposed upon the appellant for Donald's murder commands that the same sentence be imposed for Sarah's murder under § 414(e)(4).

(f)

Other Contentions

Appellant argues that Maryland's capital punishment statute is facially unconstitutional for the following reasons:

(a) Article 27, § 413(d)(10) creates an unconstitutional aggravating factor because felony murder is not one of the "small number of extreme cases" in which the death sentence is appropriate, Gregg v. Georgia, 428

U.S. 153, 182, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976);

(b) section 413(c) gives the sentencing authority virtually unbounded discretion;

(c) section 413 unconstitutionally restricts the discretion of the sentencing authority by requiring imposition of the death sentence if no mitigating circumstances are shown;

(d) the statute unconstitutionally places the burden of proving the existence of mitigating circumstances on the defendant;

(e) imposition of the death penalty violates Articles 16 and 25 of the Maryland Declaration of Rights; and

(f) the proportionality review provided for by § 414(e)(4) is inadequate.

We rejected each of these arguments in Calhoun v. State, 297 Md. 563, 606-38, 468 A.2d 45 (1983). Thus, we consider these matters settled.

JUDGMENTS AFFIRMED,

WITH COSTS.

IN THE COURT OF APPEALS OF MARYLAND

No. 151, September Term, 1982

No. 44, September Term, 1983

DONALD THOMAS

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Cole
*Davidson
Rodowsky
Couch
Menchine, W. Albert
(retired, specially assigned),
JJ.

Opinion by Eldridge, J., concurring in part and dissenting in part, in which Cole, J., concurs.

Filed: October 31, 1984

*Davidson, J., participated in the hearing and in the conference of t case in regard to its decision, bu because of illness did not take pa in the adoption of the opinion.

Eldridge, J., concurring in part and dissenting in part:

Affirmance of the death sentence in this case cannot be squared with the Supreme Court's decision in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). *Estelle* held, *inter alia*, that the admission of psychiatric testimony offered by the prosecution at a capital sentencing proceeding, based on a psychiatric examination of the defendant performed without the consent or advice of the defendant's attorney, violated the Sixth Amendment right to the assistance of counsel. With respect to the Sixth Amendment issue, the only difference between *Estelle* and the present case is that in *Estelle* there was no consent or guidance by defense counsel concerning the psychiatric examination, whereas here the "consent" of the defendant's attorney was obtained through deception. Such difference has no legal effect.

Although I agree that the guilty verdicts in this case should be upheld, I would vacate the death sentence and remand the case for a new sentencing proceeding.

I.

In order to appreciate fully the position of defense counsel in this case, and how he was misled into "consenting" to an examination by the prosecution's hired psychiatrist for purposes of the capital sentencing hearing, it is appropriate to begin with this Court's opinion in *Johnson v. State*, 292 Md. 405, 410-416, 439 A.2d 542 (1982).

In *Johnson* the indigent defendant was charged with murder and the death penalty was sought. Johnson interposed a defense of insanity, and the trial court ordered that he be transferred to the Clifton T. Perkins Hospital Center for mental examination and evaluation. The Clifton T. Perkins Hospital Center is a state facility, "maintained under the direction" of the Mental Hygiene Administration of the Department of Health and Mental Hygiene.[1] Johnson was examined by the staff at Clifton T. Perkins, and thereafter the hospital filed a report finding that, at the time of the alleged offense, Johnson "was not suffering from a mental disorder which caused him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." 292 Md. at 410.

---

[1] Maryland Code (1982), § 10-406(a) of the Health - General Article.

The report indicated that it represented the views only of a majority of the examining psychiatrists. One of the examining staff members had declined to join the report.

Johnson's attorney then petitioned the trial court "to appoint a private 'independent psychiatrist' to further examine Johnson at the expense of the State," but the trial court refused, holding that the staff doctors at Clifton T. Perkins were "'independent.'" 292 Md. at 411. On appeal, this Court agreed with the trial court regarding the issue. Drawing a sharp distinction between doctors employed by the Department of Health and Mental Hygiene and expert witnesses hired by the prosecution, Judge Digges stated for the Court (*id.* at 414, emphasis added):

> "The doctors designated by the Department of Health and Mental Hygiene to examine Johnson *are thus 'not partisans of the prosecution*, though their fee is paid by the State, any more than is assigned counsel for the defense beholden to the prosecution merely because he is . . . compensated by the State. Each is given a purely professional job to do — counsel to represent the defendant to the best of his ability, the designated psychiatrists impartially to examine into and report upon the mental condition of the accused.' *McGarty v. O'Brien*, 188 F.2d 151, 155 (1st Cir. 1951), *cert. denied*, 341 U.S. 928 (1951)."

The Court went on to point out that "Johnson was evaluated by a team of *independent* psychiatric experts" and that he

could call as his witnesses "members of the examining team." *Id.* at 415, emphasis added.[2]

Turning now to the facts in the case at bar, after the defendant Thomas filed an insanity plea the trial court, on December 8, 1981, signed an order that Thomas be examined "by the Department of Health and Mental Hygiene." Thomas was then transferred to the Clifton T. Perkins Hospital Center where he was examined and evaluated by the staff. On February 4, 1982, the hospital sent a report to the court which contained the evaluations of four staff doctors, one of whom was Dr. Michael Spodak. According to the report, all four doctors were of the opinion that Thomas was competent to stand trial and had been responsible for his actions at the time of the offenses.

---

[2] The *Johnson* court's view of Clifton T. Perkins Hospital Center is underscored by a recent murder trial in Baltimore County, in which the prosecution was seeking the death penalty and the defendant had raised the defense of insanity. In that case, *State v. Mooring*, the five Clifton T. Perkins staff psychiatrists who examined Mooring unanimously believed that he was insane at the time of the offense, and they testified as defense witnesses at the trial. At the conclusion of the trial, the court found Mooring not guilty, agreeing with the position of the Clifton T. Perkins doctors that Mooring's mental condition rendered him not criminally responsible for the victim's death. *See The Sun* (Baltimore), October 9, 1984, section D, p. 1; *The Evening Sun* (Baltimore), October 9, 1984, section D, p. 1; *The Sun* (Baltimore), October 10, 1984, section F, p. 1.

Following the trial on the issues of guilt or innocence, the prosecuting attorney filed the following petition with the court:

"PETITION FOR PRE-SENTENCE PSYCHIATRIC EVALUATION

"Now comes the State of Maryland, by Sandra A. O'Connor, State's Attorney for Baltimore County, and by Thomas S. Basham and Alfred L. Brennan, Jr., Assistant State's Attorneys for Baltimore County, and says:

"1. That the Defendant was evaluated at the Clifton T. Perkins Hospital Center following his entry of a plea of not guilty by reason of insanity;

"2. That the findings of the Hospital Center are contained in a report to the Court dated February 4, 1982;

"3. That it is desirable to supplement the original insanity evaluation with further interview(s) of the Defendant to develop material for presentation at sentencing;

"4. That Dr. Michael Spodak, who participated in the insanity evaluation, can conduct such further interview with the Defendant at the Baltimore County Detention Center and can do so within a few days of a court order authorizing such evaluation;

"5. That counsel for the Defendant has no objection to such an evaluation.

"WHEREFORE, the State prays that this Honorable Court pass an order directing Dr. Michael Spodak to conduct a further evaluation of the Defendant at the Baltimore County Detention Center for the purpose of developing material for use at sentencing.

/s/
SANDRA A. O'CONNOR
State's Attorney for
Baltimore County"

The prosecuting attorney said nothing to defense counsel or in the petition intimating that the examination and evaluation by Dr. Spodak would not be done in his capacity as a staff member of Clifton T. Perkins Hospital Center and an employee of the Department of Health and Mental Hygiene. On the contrary, the petition seemed to suggest that Dr. Spodak would be examining and evaluating Thomas as a member of the hospital's staff, as it referred to the prior evaluation "at the Clifton T. Perkins Hospital Center," referred to the Hospital Center's findings in the February 1982 report, referred to Dr. Spodak as one who participated in the previous Clifton T. Perkins evaluation, and stated that it is desirable to "supplement" the original evaluation.

Unknown to the court and to defense counsel when he consented to the supplemental examination and evaluation, was the fact that Dr. Spodak had changed hats. He would not be examining and evaluating Thomas as the "independent" psychiatrist employed by the Department of Health and Mental Hygiene. Instead, he would be acting as the prosecution's hired expert witness, paid by the prosecuting attorney's office to assist that office in obtaining the execution of Mr. Thomas.

During the sentencing hearing, after the prosecution called Dr. Spodak to the stand and the doctor acknowledged that at the time of the examination and evaluation for the sentencing hearing "I was retained by the State's Attorney's Office," the prosecution sought to introduce Dr. Spodak's report and testimony based upon that examination. Defense counsel then objected to the report and to Dr. Spodak's testimony, explaining as follows:

> "MR. KINSLEY [defense attorney]: I would object, Your Honor, not only to that but to the Doctor's testimony. When the State's Attorney requested an order of Court to have Dr. Spodak see the Defendant again on November 27th, the State's Attorney in his requested Order of the Court indicated that counsel for the Defendant had no objection. Indeed, *I had no objection because I was under the impression that Dr. Spodak would see him as a member of the staff of Clifton T. Perkins.*
>
> "I'm mindful of the Court of Appeals ruling that the Clifton T. Perkins staff, a governmental body, employees of the State of Maryland as is Dr. Spodak when he's at Clifton T. Perkins, that they are neutral or should be neutral psychiatrists and other medical personnel. That the Defense in effect has no obligation to employ separate psychiatrists but can accept this puritan view of the psychiatrists employed by the State as is Dr. Spodak, but I have learned subsequent to my agreement that I had no objection to Dr. Spodak seeing the Defendant that he was now in the employee -- he was a paid doctor by the State's Attorney's Office.

> *"This came to me as a shocking revelation, and had I known it before, I would not have permitted it. I would have been to the Baltimore County Jail and would have advised my client not to discuss any matters with Dr. Spodak so long as he was then in the employ of the State's Attorney's Office,* so I suggest that the alleged agreement by me of this whole proceeding was done without a full candid revelation. That I have been taken so to speak. That the Doctor is no longer a pure objectionist, but is a paid person whose views obviously more than likely reflect the views sought by his employer, Mr. Basham, so I move that his report not be considered and that his testimony be suppressed." (Emphasis added.)

The trial court then gave the prosecution an opportunity to respond or rebut, but the prosecuting attorney stated that he had nothing to say. The court then denied the motion in a ruling which suggested a lack of understanding concerning the nature of defense counsel's objection. The colloquy was as follows:

> "THE COURT: Anything from the State?
>
> "MR. BASHAM [prosecuting attorney]: No, Your Honor.
>
> "THE COURT: The Motion will be denied. Dr. Spodak is an eminently qualified Forensic Psychiatrist. He has testified and he knows, not knows but --
>
> "MR. KINSLEY: But all psychiatrists are eminent.
>
> "THE COURT: Excuse me. Would you like me to make my ruling please, sir? He's a qualified Forensic Psychiatrist, and as far as the

> Court is concerned, it makes no difference who pays him, and he knows it as well as I do. He's a professional person and can give his opinion, and nobody and no amount of money is going to cause him to change his opinion, so the Motion will be denied."

The defendant's attorney again attempted to explain that the basis of his objection to the admissibility of Dr. Spodak's report and testimony was not Dr. Spodak's qualifications or objectivity but was the manner in which the attorney's "consent" was obtained:

> "MR. KINSLEY: Well, let me just simply say, I don't think the Court is addressing itself to the nub of my objection, that is, had I known, whether the Court thinks he can be objective or not is immaterial. I say I would not have permitted any subsequent investigation or any subsequent conversations the Doctor may have had with the Defendant had I known he was in the employ and pay of the State's Attorney's Office.
>
> "THE COURT: Well, you misunderstand what I say. Irrespective of whether you agree or not agree, the Court permitted it on here, so the Motion will be denied, Mr. Kinsley.
>
> "MR. KINSLEY: Well, maybe the Court permitted it because it saw there that I didn't interpose an objection. The document that the Court used as a basis for permitting it was obtained improperly by the State's Attorney's Office.
>
> "THE COURT: All right. I've considered your Motion and denied it again, Mr. Kinsley.
>
> "Mr. KINSLEY: Yes, sir.
>
> "THE COURT: All right. Proceed.

> "MR BASHAM: The report then is admitted, Your Honor?
>
> "THE COURT: Yes."

Dr. Spodak went on to testify at length, with the continual objections of defense counsel being overruled. His testimony was devastating to the defense with regard to negating the existence of mitigating circumstances, particularly the statutory mitigating factors of whether the murder was committed while the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired and whether it was unlikely that the defendant would engage in further criminal activity that would constitute a threat to society.[3] For example, Dr. Spodak specifically set forth

---

[3] Code (1957, 1982 Repl. Vol., 1983 Cum. Supp.), Art. 27, § 413(g)(4) and (7), provide as follows:

> "(g) *Consideration of mitigating circumstances.* — If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:
>
> • • •
>
> "(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.
>
> • • •

his opinion that, "within a reasonable degree of medical certainty," Thomas would engage in further criminal activities and would be a threat to society. The psychiatrist testified that when he examined Thomas for purposes of the sentencing hearing, Thomas was "more hostile" than he was during the earlier examinations at the Clifton T. Perkins Hospital Center. Dr. Spodak reviewed in detail the grounds for his opinion concerning Thomas's future dangerousness, such as Thomas's prior record of violence, his "poor impulse control," his inability "to delay gratification," his lack of remorse, his inability "to handle environmental stress," etc. While acknowledging that "[t]here has been a lot of debate as to how well psychiatrists can predict dangerousness and violence," Dr. Spodak reiterated his view, with regard to Thomas, that "you can certainly say that there's a very high likelihood" of "future criminal behavior, future dangerousness and future violence." The psychiatrist stated, and later reiterated, that Thomas was not "amenable to treatment." Finally, when asked whether Thomas would engage in future criminal activity if he were incarcerated, Dr. Spodak replied: "I wouldn't want to be his cell mate."

---

3 (Cont'd.)

> "(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society."

The testimony of Dr. Spodak at the sentencing hearing furnished a principal basis for the prosecuting attorney's arguments against the existence of mitigating circumstances. On the other hand, the defense attorney *inter alia* argued extensively that Thomas's capacity to appreciate the criminality of his conduct or conform his conduct to the law had been impaired and that Thomas was not likely to engage in future criminal activity. The defense attorney relied on the earlier report from the Clifton T. Perkins Hospital Center, which he contrasted with Dr. Spodak's later testimony, as well as on other testimony and evidence.

The trial judge, in imposing the death sentence, specifically found that Thomas's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was not substantially impaired and that Thomas "will engage in further criminal activity that would constitute a continuing threat to society." In making both of these findings, the trial judge specifically relied on the testimony of Dr. Spodak at the sentencing hearing. With regard to future criminal activity and dangerousness, Dr. Spodak's testimony at the sentencing hearing was the chief ground for the trial court's finding.

II.

In light of the above-reviewed facts, it is clear to me that the instant case is controlled by *Estelle v. Smith*, *supra*.

The issue in *Estelle v. Smith*, as in the present case, was "whether the prosecution's use of psychiatric tesimony at the sentencing phase of [defendant's] capital murder trial to establish his future dangerousness violated his constitutional rights." 451 U.S. at 456. In *Estelle*, prior to trial, the court ordered the defendant to undergo a psychiatric examination in order to determine his competency to stand trial. It was not clear whether defense counsel was informed of the psychiatric examination before it took place, *id.* at 471 n. 15, and this question was not treated by the Court as significant. What was significant was that defense counsel was not notified of the scope of the examination, did not consent to the examination, and did not advise the defendant regarding his submission to the examination. *Id.* at 465, 466-468, 471. In *Estelle* the defendant was found competent to stand trial and, at the first stage of the bifurcated proceedings, was found guilty. Thereafter, at the capital sentencing hearing, the prosecution was permitted over objection to call the psychiatrist as a witness on the issue of "'whether there is a probability

that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.'" *Id.* at 458. The psychiatrist's testimony in *Estelle* was similar to Dr. Spodak's testimony in the instant case regarding the defendant's future dangerousness, amenability to treatment, etc. *Id.* at 459-460. Based upon the jury's findings, the defendant in *Estelle* was sentenced to death.

The Supreme Court in *Estelle* held that the admission of the psychiatrist's testimony at the sentencing hearing infringed both the defendant's Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel.[4] Regarding the Sixth Amendment right, the Court held that the defendant "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." 451 U.S. at 471. The Court stated "that a defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.'" *Ibid.*

Although the matter is not at all clear, I shall assume arguendo that *Estelle*'s Fifth Amendment holding is not applicable to the facts of the present case. Nevertheless,

---

[4] It is noteworthy that, while a majority of the Court favored reversal on both grounds, all nine members of the Court believed that the defendant's Sixth Amendment right to counsel had been violated.

the defendant Thomas was obviously denied the assistance of counsel in making the decision of whether to submit to Dr. Spodak's examination in connection with the sentencing proceeding. His attorney's "consent" to this examination was induced by the prosecution's deception.[5] But a "consent" induced by misrepresentation is not consent. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). As Thomas's attorney emphasized to the court below, if he had known that Dr. Spodak's role had changed and that the psychiatrist had become the prosecution's hired expert, "I would not have permitted it. I would have . . . advised my client not to discuss any matters with Dr. Spodak."

III.

The majority's reasons for rejecting Thomas's argument based on *Estelle v. Smith*, *supra*, will not withstand analysis.

---

[5] It is axiomatic that silence or nondisclosure may constitute deception or misrepresentation, depending upon the circumstances. *See, e.g.*, Equitable Co. v. Halsey, Stuart & Co., 312 U.S. 410, 424-426, 61 S.Ct. 623, 85 L.Ed. 920 (1941); Strong v. Repide, 213 U.S. 419, 430-433, 29 S.Ct. 521, 53 L.Ed. 853 (1909); W. Prosser, *The Law of Torts*, § 106 (4th ed. 1971); F. James and O. Gray, *Misrepresentation*, 37 Md. L. Rev. 488, 524-527 (1978).

Initially the majority suggests that Thomas's attorney did not in the trial court raise the Sixth Amendment issue which formed the alternate basis for the decision in *Estelle*. But the entire thrust of counsel's objection to Dr. Spodak's report and testimony was that defense counsel was misled into "consenting" and that, had he known of the doctor's role change, he "would have advised [Thomas] not to discuss any matters with Dr. Spodak." This was obviously an objection relating to the right to the assistance of counsel. I am aware of no principle of law requiring that a trial lawyer, in order to preserve an issue, must cite the specific Supreme Court case on point.[6] Moreover, we have indicated that in death penalty cases, we shall consider issues "whether or not properly preserved for review." *Johnson v. State*, *supra*, 292 Md. at 412 n. 3.

The majority opinion next attempts to distinguish *Estelle v. Smith* by stating that in Maryland, unlike Texas, the "State does not bear the burden of proving the nonexistence

---

[6] Compare the nature of the objection in *Estelle*, 451 U.S. at 459, 468 n. 12.

of mitigating circumstances" and "thus, the appellant's words were not used against him on a matter upon which, as in *Estelle*, the prosecution held the burden of proof."[7] The majority then points out that Dr. Spodak advised Thomas that any information which he revealed could be used at a subsequent capital sentencing hearing. These factors may or may not distinguish the *Estelle* case for purposes of the Fifth Amendment self-incrimination issue. Nevertheless, they are utterly irrelevant to the Sixth Amendment right to counsel issue, and I do not understand that the majority suggests otherwise.

Lastly the majority points out that, unlike the situation in *Estelle*, Thomas's attorney had prior notice of Dr. Spodak's examination for purposes of the sentencing hearing and agreed to it. Of course, this entirely ignores the fact that defense counsel was misled concerning the role of Dr. Spodak. Had defense counsel known that Dr. Spodak's role had changed, he may well have advised Thomas not to submit to the examination.

---

7 In Maryland, however, as shown by the instant case, the prosecution in capital cases typically presents, as an initial matter, evidence to negate mitigating circumstances upon which it believes that the defendant will rely.

Because of the prosecution's misleading action in this case, the defendant Thomas was deprived of the assistance of counsel in deciding whether or not to submit to Dr. Spodak's examination in connection with the capital sentencing hearing. Consequently, under *Estelle v. Smith*, Dr. Spodak's report and testimony were improperly admitted at the sentencing hearing. I would vacate Thomas's death sentence and remand for a new sentencing proceeding.

Judge Cole has authorized me to state that he concurs with the views expressed herein.

OPPOSITION BRIEF

ORIGINAL

Misc. No. 84-5943

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DONALD THOMAS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Of Counsel:

RICHARD B. ROSENBLATT,
Assistant Attorney General

7 N. Calvert Street
4th Floor
Baltimore, Maryland 21202
(301) 576-6417

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. CHASANOW,
Assistant Attorney General

7 N. Calvert Street
4th Floor
Baltimore, Maryland 21202
(301) 576-6300

Counsel for Respondent

QUESTIONS PRESENTED

1. Was Petitioner sentenced to death upon evidence obtained in violation of his right to counsel as construed in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)?

2. Whether Maryland's capital sentencing statute is impermissibly mandatory because 1) it requires that mitigating factors outweigh aggravating factors before a life sentence may be imposed and 2) it fails to afford the sentencer unbridled discretion to impose a life sentence regardless of the outcome of the weighing of aggravating and mitigating factors?

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Misc. No. 84-5943

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DONALD THOMAS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

STATEMENT OF THE CASE

Procedural history:

Respondent accepts Petitioner's Statement of the Case with respect to the procedural history as set forth in the Petition at page 20, with the following addition:

The opinion of the Court of Appeals of Maryland, Thomas v. State, 301 Md. 294, 483 A.2d 6 (1984), held that the issue concerning the application of Estelle v. Smith, supra, had not been preserved for appellate review (slip op. at 42-43; 301 Md. at 327-28, 483 A.2d at 23). It stated in the alternative

that the introduction of the testimony was not inconsistent with this Court's opinion in Estelle v. Smith.

Relevant facts:

Respondent accepts the relevant facts set forth in the Petition at pages 20-24.

REASONS FOR DENYING THE WRIT

I.

INASMUCH AS DEFENSE COUNSEL WAS INFORMED OF THE STATE'S REQUEST TO HAVE PETITIONER UNDERGO PSYCHIATRIC EXAMINATION AND HAD NO OBJECTION TO THAT REQUEST, THE INFORMATION OBTAINED AT THE INTERVIEW DID NOT DENY PETITIONER HIS SIXTH AMENDMENT RIGHT TO COUNSEL, AND THEREFORE THE TESTIMONY WAS PROPERLY ADMITTED.

The questions of sanity and competency were generated by Petitioner prior to trial. As a result, he was examined at the Clifton T. Perkins State Hospital in January and February, 1982. A report was filed, finding Petitioner criminally responsible and competent to stand trial. The jury returned a verdict of guilty on November 18, 1982. On November 26, 1982 the court granted the State's petition for a pre-sentence psychiatric evaluation, defense counsel having no objection. However, prior to the sentencing proceeding, defense counsel moved to suppress the testimony from the State psychiatrist based upon counsel's allegation that the fact that the State was going to pay the psychiatrist as an expert witness had not been disclosed to defense counsel.

Appellant now contends that the examination by the psychiatrist subsequent to conviction but prior to sentencing violated his Sixth Amendment right to counsel, placing total

reliance upon this Court's opinion in Estelle v. Smith, 451 U.S. 454 (1981). However, Petitioner's contention relates solely to dicta in the opinion of the Maryland Court of Appeals, inasmuch as that court's holding was that through procedural default, Petitioner had not preserved the Sixth Amendment question for direct appellate review. The Court of Appeals determined that the specific basis for the objection to the testimony did not include the constitutional contention and that Petitioner was bound by the limited exception for purposes of direct appeal. As this question of waiver under State law does not present a federal question, the Petition for Writ of Certiorari should be denied.

Moreover, there is no merit to Petitioner's Sixth Amendment claim. While this Court acknowledged that a Sixth Amendment right to counsel attaches to a psychiatric examination where the results are to be used at sentencing in a capital case, the analysis was limited to whether the "right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination." Estelle v. Smith, supra, 451 U.S. at 470, n. 14. The question presented in Estelle v. Smith was one of denial of counsel; the claim here is of effective assistance. There is no question in this case but that defense counsel was apprised of the examination before it occurred and, a fortiori, that defense counsel had an opportunity to consult with his client prior to Petitioner participating in the examination. Thus, Petitioner's total

claim of Sixth Amendment violation hinges upon defense counsel's allegation that he was "misled" by the State (a fact not yet determined in any forum). Counsel based this allegation upon the State's failure to disclose that the examination was not to be conducted in conjunction with the Clifton T. Perkins Hospital, but rather only by one doctor employed as an expert by the State. Nevertheless, defense counsel was aware that the initial report filed by the doctor as part of the competency/sanity determination was adverse to his client, and that the State sought "further evaluation of the defendant

. . . for the purpose of developing material for use at sentencing." (Petition p. 22). The record fails to disclose any affirmative misrepresentations by the State, and no action by either the court or the State that would have precluded inquiry by defense counsel into the doctor's status. Indeed, in Estelle v. Smith, this Court noted that it is the projected use of the information, and not the neutrality of the psychiatrist, that determines the application of the Fifth and Sixth Amendments. Id., 451 U.S. at 467. Given that defense counsel knew that the results of the examination were sought by the State for use at the sentencing proceeding, and had an opportunity to consult with Petitioner on the question of whether to oppose the request or to cooperate, there is no Sixth Amendment violation apparent on this record.

The result urged by Petitioner is not mandated by this Court's opinion in Estelle v. Smith, supra. In Estelle, the

psychiatric interview was part of a competency evaluation, ordered sua sponte by the trial court without any insanity plea. Defense counsel alleged that they were not even aware of the evaluation. Id., 451 U.S. at 458, n.5. In any event, defense counsel were never informed that the examination results could be or would be used at sentencing. Here, defense counsel was equipped with such knowledge. As a result, the Petition for Writ of Certiorari should be denied.

II.

THE MARYLAND CAPTIAL PUNISHMENT STATUTE CLEARLY COMPORTS WITH THE DICTATES OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND, AS A RESULT, REVIEW IS UNWARRANTED.

Petitioner's attack on the Maryland Court of Appeals interpretation of the State capital punishment statute presents the same constitutional contention raised by other Maryland petitioners to whom review was denied.[1] That is, whether the Maryland capital punishment statute violates the Eighth and Fourteenth Amendments to the United States Constitution because the imposition of a sentence of death is mandatory where the convicted felon fails to produce sufficient evidence in mitigation to outweigh by a

---

[1] See Tichnell and Calhoun v. State, cert. denied and rehearing denied, No. 83-6348 (1984); Colvin v. State, cert. denied, No. 83-6740 (1984) Stebbing v. State, cert. denied, No. 84-5079 (1984); Trimble v. State, cert. denied, No. 84-5735 (1985); White v. State, cert. denied, No. 84-5736. The State cites these authorities not for their precedential value, but rather for the purpose of clarifying the issue raised. However, the State submits that the rationale for denying certiorari in these earlier cases is equally applicable here.

preponderance the aggravating factors proven by the State beyond a reasonable doubt. This burden, coupled with the statute's failure to afford a sentencer unbridled discretion to impose a sentence of life without regard to the outcome of the legislatively enacted mechanism of weighing aggravating against mitigating circumstances is alleged to render the statutory scheme unconstitutional. Because the Constitution requires no such discretionary authority, and provides no bar to the requirement that mitigating circumstances must outweigh aggravating circumstances once it is established beyond a reasonable doubt that the case is death eligible, Petitioner's contention is wholly without merit and therefore the Petition for Writ of Certiorari should be denied.

As noted in Woodson v. North Carolina, 428 U.S. 280, 303 (1976), the basic requirement of Furman v. Georgia, 408 U.S. 238 (1972), was that arbitrary and wanton jury discretion be replaced with objective standards to "guide, regularize, and make rationally reviewable the process for imposing a sentence of death." In analyzing State statutes enacted subsequent to the opinion in Furman, the Florida scheme, in which a jury makes an advisory recommendation as to sentence by weighing aggravating against mitigating circumstances, following which a judge acts upon the recommendation by conducting his own aggravating versus mitigating circumstances examination, was approved. Proffitt v. Florida, 428 U.S. 242, 248-51 (1976). In fact, the Florida Supreme Court had earlier described its statute as creating a presumption of death:

> "When one or more aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury." [2] State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

The Maryland statute does no more than was permitted there.

The Court similarly approved the Texas scheme which required that death be imposed if two (or three, if relevant) questions are answered in the affirmative. The Texas procedure was not found to be mandatory because of the unlimited scope of evidence that could be introduced and considered regarding the second question, i.e., the potential for future dangerousness. Jurek v. Texas, 428 U.S. 262 (1976).

The focus of the Court in determining adherence to the United States Constitution was with the scope of evidence that can be considered in insuring that an individualized sentence is imposed. Because of a restriction on evidence precluding the imposition of an individualized sentence, the capital punishment schemes of North Carolina, Woodson v. North Carolina, supra, and Louisiana, Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), were invalidated. As noted in the Roberts plurality opinion, the Louisiana statute, for

---

[2] As recognized in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3430 n.3, 77 L.Ed.2d 1134, 1151 n.3 (1983) (concurring opinion of Stevens, J.), evolving caselaw indicates that this "presumption" may be overcome. Nevertheless, at the time approved by the Court, the Florida statute was thought to be "mandatory" to that extent.

example, provided "no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." Id. at 333-34.

Petitioner does not contend, as he cannot, that the Maryland capital punishment scheme is mandatory in the same sense as Woodson or Roberts.[3] Nor can Petitioner contend that the Maryland capital punishment statute in any way limits his right to produce evidence in mitigation or precludes consideration of any mitigating circumstance.[4] Rather,

---

[3] By Chapter 521, Laws of 1979, subsection g(8) was added to the statute, Article 27, §413, permitting the sentencer to delineate:

> "Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case."

[4] In his dissent to the denial of certiorari in Stebbing v. State, ___ U.S. ___, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984), Justice Marshall asserts that because the specific mitigating factors listed are "matters of legal and moral judgment" rather than "historical fact" there is an increased likelihood that the defendant will fail to completely prove a mitigating factor. Thus, Justice Marshall reasons, "the sentencer would be prevented from considering any of the evidence adduced in an effort to meet the burden of proof." However, while the failure of proof does preclude a sentencer from finding the specific enumerated mitigating factor, nothing in the Maryland scheme would prevent the sentencer from finding that which is proven to be an "other" mitigating factor under Art. 27, §413(g)(8). The sentencers in Maryland have yet to experience any difficulty in articulating "other" mitigating fetors, such as "environment." In the speculative case of a jury unable to articulate a mitigating factor proven, but "too intangible" to write into words, the result will not be death, but a jury unable to conclude on an appropriate sentence - which under Art. 27, §413(k)(2) results in a life sentence. Moreover, sentencing juries are not expected to presume anything with respect to what may or may not be included within this open mitigating factor; they are instructed that they may include (Cont'd)

Petitioner contends that, while the Constitution may require the guidance of discretion through aggravating and mitigating circumstances in imposing a sentence of death, the Constitution simultaneously proscribes restrictions on discretion at the same sentencing proceeding regarding the sentencer's ability to impose a sentence of life.

In support of this proposition, Petitioner has placed reliance upon Justice Stevens' opinion respecting the denial of certiorari in Smith v. North Carolina, 459 U.S. 1056, (1982). In that opinion, Justice Stevens seems to have separated the consideration of aggravating and mitigating circumstances from the determination as to whether "death is the appropriate punishment in a specific case." Id. 103 S.Ct. at 475, quoting Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion). However, a review of the opinion in Lockett fails to indicate any basis for distinguishing between the weighing of aggravating and mitigating circumstances and the inquiry into whether "death is the appropriate punishment in a specific case."

The above-referenced quotation from Lockett may be more readily understood in its context of discussing the earlier Woodson opinion:

> "The plurality concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the
>
> ---
>
> any fact or circumstance proven they find has a mitigating effect.

> particular offense as a constitutionally indispensable part of inflicting the penalty of death.' Woodson v. North Carolina, 428 U.S. at 304, 49 L.Ed.2d 944, 96 S.Ct. 2978, in order to insure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.' Id., at 305, 49 L.Ed.2d 944, 96 S.Ct. 2978. . . ." Lockett v. Ohio, 438 U.S. at 601.

Thus, as is readily apparent, that portion of the Lockett opinion did not contemplate a separate inquiry into whether death is appropriate; rather, it indicated that the Constitution mandated some type of procedure that would enable the sentencer to consider the character and record of the individual offender and the circumstances of the particular offense. Maryland has satisfied this constitutional obligation in its system of aggravating and mitigating circumstances.

Acceptance of Petitioner's argument, moreover, would inevitably lead to the reinstitution of a system allowing unbridled discretion. If life sentences may be imposed without regard to articulated aggravating and mitigating factors, there will soon be no principled and rational way to differentiate the few cases in which the death penalty is imposed from the many in which it is not. All the Maryland statute requires is that the sentencer identify the mitigating factor - be it statutory or otherwise - that outweighs the statutory aggravating factors in the case. Without such articulation, the statutorily mandated proportionality review conducted by the Court of Appeals of Maryland would become

immensely difficult. See Maryland Code, Article 27, §414(e)(4); Tichnell v. State, 287 Md. 432, 464-65, 468 A.2d 1 (1983). Under the opinions in Proffitt, Jurek and Lockett, the Maryland procedure is constitutionally sound.

In addition to the prior decisions of this Court supporting the State of Maryland's position concerning the absence of any need to provide a sentencer with absolute discretion to impose life without regard to the outcome of the weighing process, the same decisions support the constitutionality of the burden imposed upon the convicted felon. All that is required under the prior decisions of this Court is that the jury be given the opportunity to determine whether or not mitigating factors exist.

In sum, the Maryland Legislature has enacted a system of guided discretion assuring that a death penalty will be imposed only after consideration of the circumstances of the crime and the characteristics of the defendant. There is no restriction on what may be considered as a mitigating circumstance and no restriction on the relevant evidence that a defendant may produce. As a result, there is simply no constitutional infirmity and no need for further review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied, review being neither desirable nor in the public interests.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. CHASANOW,
Assistant Attorney General

7 N. Calvert Street
4th Floor
Baltimore, Maryland 21202
(301) 576-6300

Counsel for Respondent

Of Counsel:

RICHARD B. ROSENBLATT,
Assistant Attorney General

7 N. Calvert Street
4th Floor
Baltimore, Maryland 21202
(301) 576-6417

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 1985, the Brief in Opposition to Petition for Writ of Certiorari was mailed to the Court, and copies thereof were mailed, postage prepaid, to George E. Burns, Jr., and Michael R.

Braudes, Assistant Public Defenders, Tower Building, 322 E. Baltimore Street, Baltimore, Maryland 21202.

RICHARD B. ROSENBLATT,
Assistant Attorney General

OPINION

SUPREME COURT OF THE UNITED STATES

DONALD THOMAS *v.* MARYLAND

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 84–5943. Decided March 25, 1985

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Maryland Court of Appeals insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

To my mind, the Constitution requires that the State bear the burden of proving that a death sentence is appropriate in a given case. In two ways, the Maryland statute precludes this allocation of the burden of proof. First, it places on the defendant the burden of convincing the sentencer that mitigating evidence outweighs aggravating evidence, and it *requires* that a death sentence be imposed whenever aggravating factors are not outweighed. Md. Ann. Code, Art. 27, § 413(h) (1982 and Supp. 1983). The statute thereby places on the defendant the burden of proving that which is, under the existing statute, the ultimate question.

Second, by requiring that death be the sentence whenever aggravating factors are not outweighed, the statute prevents the sentencer from making what to my mind must be the ultimate inquiry: whether death is the appropriate sentence in

a given defendant's case. For the reasons I stated earlier this Term in *Stebbing* v. *Maryland*, —— U. S. —— (1984) (MARSHALL, J., dissenting from denial of certiorari), I believe that such a statute is unconstitutional, and I therefore dissent from the Court's refusal to hear this case.

JUSTICE POWELL took no part in the consideration or decision of this petition.